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PREFACE TO SECOND EDITION.

A SECOND EDITION of this Practice having been called for, I have gone through the work with great care, and have found, firstly, that there were some things omitted originally; and secondly, that in the three years which have elapsed since the publication of the first edition much has occurred in the shape of Acts, Rules, and Cases to render necessary very material alterations throughout. My work has to some extent been rendered easier by a practical observance in reading with my pupils, of various points and alterations, and also by being myself actively engaged in my profession, and having particular matters of practice therein from time to time drawn to my attention. The various new Rules, and particularly those of April 1880, had rendered the former edition unsatisfactory, and though I had endeavoured to rectify the imperfections which necessarily arose, by publishing and having bound up with the work some observations on those Rules, yet I am glad a new edition has now become necessary, that I may

present the work to my readers in a whole and complete state down to the present time.

A new edition of any work on Practice is at the present time also very appropriate, by reason of the recent Order in Council uniting the Queen's Bench, Common Pleas, and Exchequer Divisions into one, called the Queen's Bench Division, and abolishing the time-honoured offices of Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer. This was an alteration demanded by common sense, and which could only have been withstood by conservatism of a character that does not now very largely exist. In the House of Commons, the mover of an address against the Order in Council effecting the change, spoke eloquently on the fading away of our ancient institutions,—but of what avail in this age of utilitarianism? The Student will find that all alterations necessary on account of this Order have been embodied in the text.

Though amplifying the work in various places, and adding one additional chapter (on Arbitration), and also giving some Forms in the Appendix which were not in the former edition, I have not forgotten what I originally aimed at, that is, avoiding unnecessary details and stating the matter in as short a form as it conveniently could be put; and the Student,—although the book contains 233 pages as against 173 in the first edition,—will not have much to complain of in the size of it. Its success as a book for Students is amply shewn by reference to past examinations.

Beyond Students, I hope and expect that this work will prove of use to practitioners, as being a handy volume from which matters arising in practice can be quickly found, and enabling the practitioner to at once turn to the point in the particular Act, Rule, or Order. With this view I have taken particular pains in revising and enlarging the Index.

J. I.

22 CHANCERY LANE, W.C.

June 1881.

PREFACE TO FIRST EDITION.

In September, 1875, I published a guide to the Supreme Court of Judicature Acts, 1873 and 1875, in the shape of Questions and Answers, considering that, at that time, the most useful way of bringing the subject of the new practice before the Student. Over two years having elapsed since the Judicature Acts came into operation, and the practice having become somewhat settled, it may be now advantageously considered as a whole, and not simply with reference to the alterations made by the Acts.

My object in writing the present work has been to give to the Student, as shortly and simply as possible, such an elementary view of the proceedings in the Queen's Bench, Common Pleas, Exchequer, and Chancery Divisions of the High Court of Justice as will enable him to satisfactorily pass any reasonable examination on the subject. I have specially aimed at avoiding details which have appeared to me unnecessary or beyond the scope of the book, and also at putting the subject-matter in as short form as is con-

sistent with a proper explanation. If in any points it should be that I have been too brief, the references given throughout will furnish the means of acquiring further information or explanation.

If my object has been successfully attained, I think I shall have supplied a great want which at the present time exists, especially amongst Students for the Final Examination of the Incorporated Law Society.

I have to thank my friend and former pupil Mr. T. EUSTACE SMITH for his assistance in preparing the Index.

J. I.

22 CHANCERY LANE, W.C.

March 1878.

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A

MANUAL OF THE PRACTICE

OF THE

SUPREME COURT OF JUDICATURE.

PART I.

OF THE COURTS, THE JUDGES AND OFFICERS
THEREOF; AND OF PARTIES TO ACTIONS AND
JOINDER OF CAUSES OF ACTION.

CHAPTER I.

THE FORMER COURTS AND THE PRACTICE THEREIN.

THE Supreme Court of Judicature Acts of 1873 (*a*) and 1875 (*b*), although to a great extent constituting in themselves a new practice, yet require at the outset for their proper understanding some slight explanation of the former Courts, and the practice therein, especially as, where no provision is made on the subject, the jurisdiction of the Courts is to be exercised as nearly as can be in the same manner as formerly (*c*). All, however, that is sought in the present chapter is to give the student some information purely general in its nature.

The Courts of Common Law were older in their

The Courts of
Common Law.

(*a*) 36 & 37 Vict. c. 66.

(*b*) 38 & 39 Vict. c. 77.

(*c*) Jud. Act, 1873, s. 23.

B

Aula Regis.

origin than the Court of Chancery, being, indeed, the outcome of a very ancient body called the *Aula Regis*. In this Court the Sovereign was Judge, and the Court followed the Sovereign wherever he went over the country; the inconvenience of this was found to be so great that it was enacted by Magna Charta that "Common Pleas" should no longer follow the King's person, but be held in some fixed place. In consequence of this enactment the Court of Common Pleas (so called in contradistinction to Crown Pleas) was established at Westminster, and all ordinary civil matters were determined there. Later in Edward the First's reign the Court of Exchequer was carved out of the Aula Regis for the determination and management of Revenue matters, and the remnant of the Aula Regis was styled the King's Bench, and continued, as the old Aula Regis had done, to possess a criminal jurisdiction and also a superintending power over the inferior tribunals in the kingdom. By certain fictions which it appears unnecessary now to explain, the Court of Exchequer and the Court of King's Bench acquired a civil jurisdiction as well as the Court of Common Pleas.

The Common Law Courts became, therefore, three in number, viz., the Court of King's or Queen's Bench, the Court of Common Pleas, and the Court of Exchequer. At the time the Judicature Acts came into operation, actions were brought in common in any one of these Courts as the litigant chose, but each had also some exclusive jurisdiction; particularly the Court of Queen's Bench had an exclusive power over inferior jurisdictions, and also a general criminal jurisdiction; the Court of Common Pleas had an exclusive jurisdiction in actions relating to dower, and by 6 Vict. c. 18, s. 60, in appeals from decisions of revising barristers as to registration of electors; and the Court of Exchequer had an exclusive jurisdiction in Revenue matters.

At the time the Judicature Acts came into operation the Courts of Common Law comprised fifteen Judges, viz., the Lord Chief Justice of England, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and twelve puisne Judges, or Judges of less degree. Appeals lay, in the first instance, to a Court known as the Exchequer Chamber, and from thence to the House of Lords.

Former Judges
at Common
Law.

The Court of Chancery arose from the defects of these Courts of Common Law. For every right there was supposed to exist at Common Law a certain proper form of writ, but in respect of some matters for which clearly relief ought to have been given no form of writ was found, and the practice therefore grew up of applying to the Sovereign in person, asking him as a matter of favour to give the required remedy. The Sovereign generally deputed such applications to his Lord Chancellor, and therefore gradually the practice grew up of applying direct to the Chancellor, who thus in himself originally constituted the Court of Chancery (*d*).

The Court of
Chancery.

At the time of the coming into operation of the Judicature Acts the Court of Chancery comprised seven Judges, viz., the Lord Chancellor and two Lords Justices constituting—either sitting together or separately—a Court of Appeal, and the Master of the Rolls and three Vice-Chancellors. The Lord Chancellor, as before explained, was the first Judge in Chancery (*e*); the Master of the Rolls was originally merely a master in Chancery to whom certain matters were referred, and by a gradual development his position assumed that of an independent Judge, being finally settled by statute (*f*); the three Vice-Chancellors were appointed respectively in 1811 and 1842, and the Lords

Former Judges
in Chancery.

(*d*) See Haynes' Outlines of Eq. pp. 11-18

(*e*) Supra.

(*f*) See Haynes' Outlines of Eq. pp. 50-54.

Justices in 1851. On account of his more ancient origin the Master of the Rolls ranked next to the Lord Chancellor in order of precedence. The ultimate Court of Appeal was, as at Common Law, the House of Lords.

Difference in relief at Law and in Equity

The Courts of Law were governed by strict rules, but it was different with the Court of Chancery in its first origin. There originally justice was measured out according to the conscience of each particular Chancellor; but in course of time this ceased to be the case. Equity was modelled from time to time by various Judges, and legislative enactments, so that at the time of the Judicature Acts Courts of Equity were as much bound by legislative enactments and precedent decisions as were the Courts of Law.

Inconvenience of the two distinct systems of Law and Equity.

These two different systems of Law and Equity had therefore their origin naturally enough, but however satisfactory in explanation was their separate existence, it could hardly be said to be so in practice, for in some cases a litigant ran the risk of applying for relief to the wrong Court, and thus failing, having to bear the cost of his proceedings and commence over again in the other Court; in other matters the one Court could give a partial relief, and for complete relief the assistance of the other had also to be obtained, and there was besides a wide difference in the practice.

It will now be best to give shortly an outline of the former practice in the Courts of Common Law and the Court of Chancery respectively, so that the student may be able to compare some points of the old with the new practice given throughout this work, and thus see with greater force the nature and effect of the alterations.

Former Common Law practice. Writ.

The first step in an ordinary Common Law action was a writ of summons, being in its main particulars the same as a writ of summons under the present

practice (*g*). This was served on the defendant, and on his failing to appear thereto within eight days judgment was signed, much the same as under the present practice. If he appeared the pleadings then commenced.

The first pleading in the action was a declaration, Declaration. being a written statement of the plaintiff's case, couched in many particulars in technical language, and frequently in its technicalities involving considerable repetition and running on to considerable length. This was delivered to the defendant's solicitor—or attorney, as he was called at law—with a notice indorsed thereon requiring him to plead thereto within eight days.

The next step was a plea by the defendant, being a Plea. written statement of his case, and, like a declaration, often very lengthy and very technical.

The plaintiff then delivered a replication, which was Replication. usually simply a joinder of issue, viz., a direct denial of the points urged by the defendant, and if this were so the pleadings were then ended, for the great object of pleadings was, and indeed still is, to arrive at a direct point in issue between the plaintiff and defendant. Sometimes, however, a direct issue could not be then arrived at, and it became necessary to have subsequent pleadings to attain that object, and these were called the rejoinder, the surrejoinder, the rebutter, the surrebutter, and if it were necessary to continue the pleadings after this they had no distinctive names. However Rejoinder, surrejoinder, rebutter, and surrebutter. for them to go as far as this did not often occur; they usually terminated with the replication.

Issue, having been joined, the next step was notice Notice of trial. of trial by the plaintiff.

The cause then came on to be heard in due course, Verdict, judgment, and execution.

(*g*) As to which, see post, p. 37.

the evidence at the trial being *vivâ voce*, and then followed verdict, judgment, and execution.

Former Chancery practice. Bill of complaint.

The first step in an ordinary Chancery suit was a bill of complaint, which was a printed (*h*) document containing a full and detailed statement of the plaintiff's case. This having been filed a sealed copy was served on the defendant, and he appeared thereto within eight days.

Interrogatories.

An almost invariable practice was then for the plaintiff to file interrogatories, being substantially the bill of complaint put into the form of questions. To these interrogatories the defendant was bound to put in an answer which practically contained his defence.

Answer.

If the plaintiff did not deliver interrogatories it was open to the defendant to put in a voluntary answer, which was practically a voluntary defence. The bill and answer (if any), or if none, the bill alone thus formed the pleadings in a Chancery suit.

Notice of motion for decree.

The most usual course (*i*) then to bring the cause to a hearing was for the plaintiff to give to the defendant notice of motion for decree, which was a notice that he intended to apply to the Court to give him the relief he considered himself entitled to. The evidence was not *vivâ voce*, as at Common Law, but by affidavits, the plaintiff first filing his affidavits in support, then the defendant his in answer thereto, and finally the plaintiff filing any further affidavits in reply on any new points appearing from the defendant's evidence. The cause was then set down and in due course came on to be heard.

Difference in the nature of

One of the great differences under the old system—and one which will hereafter be touched on under the

(*h*) In some few cases where expedition was required a written bill could be filed, but a printed copy had to be filed afterwards within fourteen days.

(*i*) It is unnecessary to refer to the other courses.

present practice (*k*)—was the difference in the kind of case that usually came before the Court of Chancery and the Courts of Law. In a Court of Law the plaintiff almost invariably only sued to recover a sum of money, and on the hearing of the cause the whole matter could be disposed of by the verdict of the jury and the judgment founded thereon. But in Chancery this was usually different; there the plaintiff was frequently proceeding in respect of matters of intricacy, and in almost all cases in matters which involved more than could be settled in open Court. For instance, in an administration suit, it would have been impossible for the whole matter at once to have been disposed of in open Court. It was necessarily impossible for the Court to then and there find out what the estate consisted of, what were the debts, who were the parties interested, and so on. So again, take a suit for dissolution of a partnership, and for the partnership accounts to be taken, how could the Court dispose of this at once? It was manifestly impossible. And this was so in the great majority of cases. This should be well noticed by the student, for though dwelt upon here primarily as explaining the former practice, it also explains the present; for there still exists a distinction between the majority of cases coming before the Chancery Division on the one hand, and the Queen's Bench Division on the other hand, as will be hereafter seen.

At the hearing of the cause then, the Court, being unable to dispose of the whole matter at that time, made a decree directing certain accounts and inquiries to be taken and made. Thus in an administration suit, amongst others, an account of the testator's personal estate, an account of his debts, an inquiry as to the persons beneficially interested, &c.; or in a partnership suit, an account of the partnership assets, of the

(*k*) See post, p. 121.

proportion in which each was entitled, &c. The decree was then, after having been drawn up (*l*), carried into Chambers and worked out before the Judge's Chief Clerk (*m*), who finally made his certificate of the result of the accounts and inquiries referred to him. Then on this certificate the cause came before the Court again on what was called a hearing on further consideration, when the Court made its final decree, called an order on further consideration. This order usually brought the suit to a conclusion.

Chief Clerk's certificate.

Order on further consideration.

Summary.

The following statement, in columns, contrasts at a glance the most usual points in the Common Law and Chancery procedure respectively :—

Common Law.

Chancery.

Writ of summons by plaintiff and service thereof.

Appearance by defendant.

Declaration by plaintiff.

Plea by defendant.

Replication by plaintiff.

(Occasionally subsequent proceedings, being rejoinder by defendant, surrejoinder by plaintiff, rebutter by defendant, surrebutter by plaintiff, &c.)

Notice of trial by plaintiff.

Entry of cause for trial.

Cause heard by judge and jury, verdict, judgment, and execution.

Bill of complaint by plaintiff and service thereof.

Appearance by defendant.

Answer by defendant founded on interrogatories administered by plaintiff. If no interrogatories administered, no answer necessary; but a voluntary answer optional.

Notice of motion for decree by plaintiff, followed by affidavits by plaintiff, then by defendant in answer, and then by plaintiff in reply.

Entry of cause for trial.

Cause heard by Judge, and decree made directing accounts and inquiries to be taken and made.

Decree carried into Chambers,

(*l*) As to the drawing up, which is the same now, see post, p. 128.

(*m*) See post, p. 131.

*Common Law.**Chancery.*

and summons taken out to proceed thereon.
 Evidence brought in before Chief Clerk on accounts and inquiries.
 Chief Clerk's certificate.
 Cause set down for hearing on further consideration.
 Hearing on further consideration, when final decree made disposing of the whole matter. (In many cases, however, the matter could not be finally disposed of even then, *e.g.*, if there were infants wards of Court, and then liberty was given to apply to Court at any time, and further consideration reserved.)

The foregoing is of course but an outline of the most usual former proceedings. The student must not imagine that the various things he reads of in the subsequent pages are necessarily new, as many of them are similar to the old practice. To detail further the former procedure would, in the Author's opinion, tend to lead the student into confusion.

The Judicature Acts are not the first steps that have been taken for the fusion of the two systems of Law and Equity. From time to time Acts have been passed giving to the Courts of Law certain powers before only exercised by Courts of Equity, and to the Court of Equity powers before only exercised by the Court of Law. The chief of these steps towards fusion may be here shortly noticed :—

1. *Common Law Powers given to the Courts of Equity.* Steps towards fusion prior to the Judicature Acts.

By 14 & 15 Vict. c. 83, s. 8, they were enabled to obtain the assistance of a Common Law Judge instead

of sending cases for the opinion of a Common Law Court.

By 21 & 22 Vict. c. 27, they might award damages either in addition to or in substitution for injunctions or specific performance.

By 25 & 26 Vict. c. 42, they might try questions of fact with or without a jury.

2. Equity Powers given to the Courts of Common Law.

By the Common Law Procedure Act, 1852 (*n*), they were enabled to grant relief in actions for non-payment of rent or mortgage money (*o*).

By the Common Law Procedure Act, 1854 (*p*), they might grant injunctions against the continuance of any injury (*q*), specific performance in certain limited cases (*r*), give discovery (*s*) and allow equitable defences to be set up (*t*).

By the same Act (*u*) they might order the specific delivery up of chattels wrongfully detained instead of giving defendant the option of retaining them on paying their value; and by the Mercantile Law Amendment Act, 1856 (*x*), they might do the same in actions for breach of contract to deliver goods.

By the Common Law Procedure Act, 1860 (*y*), they

(*n*) 15 & 16 Vict. c. 76.

(*o*) Sect. 212.

(*p*) 17 & 18 Vict. c. 125.

(*q*) Sect. 79.

(*r*) Sect. 68, and see on construction put on it, *Benson v. Paull*, 27 L. T. Rep. 78.

(*s*) Sect. 51.

(*t*) Sect. 83.

(*u*) Sect. 78.

(*x*) 19 & 20 Vict. c. 97, s. 2.

(*y*) 23 & 24 Vict. c. 126.

might grant relief against forfeiture of a lease for non-insurance (z).

And now the final step towards fusion has been taken by the Judicature Act, 1873, the object of that Act being to do away with separate Courts for different matters, and also the anomaly of the existence of two distinct tribunals, and to assimilate the whole practice as much as possible. The constitution of the Courts under that Act and the Judicature Act of 1875 will be found detailed in the next chapter.

(z) Sect. 2.

CHAPTER II.

THE PRESENT COURTS.

The Supreme
Court of
Judicature.

By the Judicature Act, 1873, the former Courts, viz. (1) the Court of Chancery, (2) the Court of Queen's Bench, (3) the Court of Common Pleas, (4) the Court of Exchequer, (5) the Court of Admiralty, (6) the Court of Probate, and (7) the Divorce Court (*a*), are united and consolidated into one Court called the "Supreme Court of Judicature," which is divided out into two permanent divisions, viz., "Her Majesty's High Court of Justice" for original jurisdiction and certain appellate jurisdiction from inferior Courts, and "Her Majesty's Court of Appeal" for appellate jurisdiction (*b*). The two Judicature Acts came into operation on the 1st of November, 1875 (*c*).

It is necessary that before proceeding to the present actual practice of the Courts, the student should have some idea of their constitution, and also of the Judges or officers who preside in them or assist in carrying out the details of practice.

Constitution of
the High Court
of Justice.

To deal firstly with the High Court of Justice. There were until lately five divisions in this Court, corresponding with the previous Courts, which, as just

(*a*) No reference to the origin of or practice in these three last-mentioned Courts is made in this work, as being beyond it. Nor of course to the Court of Bankruptcy, which it may be noticed is *not* at present united in the Supreme Court, the provision to that effect in the Jud. Act, 1873, being repealed by the Jud. Act, 1875, s. 9.

(*b*) Jud. Act, 1873, ss. 3 and 4; Jud. Act, 1875, s. 9.

(*c*) Except as to House of Lords, as to which, see post, p. 26.

stated, are united and consolidated into one, viz. (1) the Chancery Division, (2) the Queen's Bench Division, (3) the Common Pleas Division, (4) the Exchequer Division, and (5) the Probate, Divorce, and Admiralty Division (*d*). The previous Judges of the different Courts are Judges of the High Court (*e*), and generally until lately sat in Divisions synonymous with the previous Courts; but this did not prevent any Judge from sitting when required in any divisional Court, and any Judge might be transferred from one Division to another by her Majesty under her royal sign manual (*f*). The Judge who was chief of any formerly existing Court was until lately president of the analogous Division, viz., of (1) the Lord Chancellor; (2) the Lord Chief Justice of England; (3) the Lord Chief Justice of the Court of Common Pleas; (4) the Lord Chief Baron of the Exchequer, and of (5) the originally existing Judge of the Court of Probate was made president, but subject thereto the senior Judge of such Division (*g*). When any vacant judgeships occur new Judges may be appointed by letters patent (*h*). The Judges (other than the Lord Chancellor) hold their offices for life subject to a power of removal by Her Majesty on an address presented by both houses of Parliament (*i*). The Judges.

By a recent Order in Council dated 6th January, 1881, and which came into operation on the 26th February, 1881 (*j*), it has been ordered that the number of the Divisions of Her Majesty's High Court of Justice be Recent Order
in Council.

(*d*) Jud. Act, 1873, s. 31, see note in Griffith and Loveland's Pr. p. 55. There the authors state, "There really seems no good reason why the High Court of Justice should be divided into five divisions, though there is much to be said for three."

(*e*) Jud. Act, 1873, s. 5.

(*f*) Jud. Act, 1873, s. 31.

(*g*) Ibid.

(*h*) Jud. Act, 1873, s. 5.

(*i*) Jud. Act, 1875, s. 5.

(*j*) Made by the authority of sect. 32 of the Jud. Act, 1873.

reduced by the consolidation and union of all the Judges then attached respectively to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division, in one Division called "The Queen's Bench Division," under the presidency of the Lord Chief Justice of England, and that the offices of Lord Chief Justice of the Common Pleas and Lord Chief Baron of the Exchequer, being then vacant, should be reduced to an equality with the offices of the other Judges of Her Majesty's High Court of Justice who are not *ex officio* Judges of Her Majesty's Court of Appeal, by the abolition of the said titles and all ranks and dignities relating thereto. By force of this Order the Divisions above mentioned and numbered 2, 3, and 4 respectively, now constitute one Division, viz., "The Queen's Bench Division," which may for practical purposes be well styled the Common Law Division as opposed to that numbered 1, viz., the Chancery Division.

Jurisdiction
vested in the
High Court.

As the various formerly existing Courts, except the Court of Bankruptcy, are consolidated into one, it follows that the High Court of Justice should have vested in it all their original jurisdiction, which is, indeed, specially provided; and it has also vested in it the jurisdiction of the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, and the Court created by Commissions of Assize, Oyer and Terminer, and of Gaol Delivery, and this is to include the jurisdiction vested in the Judges of the said Courts sitting in Court or Chambers, or elsewhere, in pursuance of any statute, law, or custom (*k*). But it is specially provided that there shall *not* be transferred to the said Court the jurisdiction of the Court of Appeal in Chancery, or of the same Court in Bankruptcy, the jurisdiction of the Court of Appeal in Chancery of the county palatine of Lancaster, the lunacy jurisdiction

(*k*) Jud. Act, 1873, s. 16, amended by Jud. Act, 1875, s. 9. See Griffith and Loveland's Pr. p. 13.

formerly vested in the Lord Chancellor and Lords Justices, the jurisdiction vested in the Lord Chancellor in relation to grants of letters patent, or as visitor of any college, and any jurisdiction of the Master of the Rolls in relation to records (*l*).

With regard to the distribution of business amongst the different Divisions of the Court, generally the same matters as would have before been within the exclusive and peculiar jurisdiction of each different Court (*m*), are now within the exclusive and peculiar jurisdiction of the corresponding Division. Particularly the following matters are assigned to the Chancery Division of the Court:—

Distribution of business amongst the different Divisions.

Matters within the exclusive jurisdiction of the Chancery Division.

- (1.) All causes and matters pending in the Court of Chancery at the commencement of the Act.
- (2.) All causes and matters to be commenced after the commencement of the Act under any Act of Parliament by which exclusive jurisdiction in respect of such causes or matters has been given to the Court of Chancery or to any Judges or Judge thereof respectively, except appeals from County Courts.
- (3.) All causes and matters for any of the following purposes:
 - The administration of the estates of deceased persons;
 - The dissolution of partnerships or the taking of partnership or other accounts;
 - The redemption or foreclosure of mortgages;
 - The raising of portions or other charges on land;

(*l*) Jud. Act, 1873, s. 17; Griffith and Loveland's Pr. p. 14.

(*m*) See ante, pp. 6, 7.

The sale and distribution of the proceeds of
 property subject to any lien or charge;
 The execution of trusts, charitable or
 private;
 The rectification or setting aside or cancel-
 lation of deeds or other written instru-
 ments;
 The specific performance of contracts be-
 tween vendors and purchasers of real
 estates including contracts for leases:
 The partition or sale of real estate;
 The wardship of infants and the care of
 infants' estates (*n*).

Primarily the plaintiff is allowed an absolute choice of which Division he will commence his action in, but if he commence it in a Division to which it should not have been assigned, the Court may, on summary application, transfer it to the proper Division, or retain the same in the Division in which it is commenced; and an action must not be commenced in the Probate, Divorce, and Admiralty Division unless formerly it would have been commenced in one of those Courts (*o*).

Recent Order
in Council.

By the recent Order in Council already referred to (*p*) it was ordered that all causes and matters then pending in any of the three Divisions so united and consolidated, as before stated, should be transferred to the Queen's Bench Division to be so formed as aforesaid, and that all proceedings of every kind which might be then pending in any such causes or matters should be continued, carried on, and completed in the Queen's Bench Division to be so formed as aforesaid, in the same manner in all respects as they would have been in the Division to which they were previously assigned if the same had not been united or consolidated with

(*n*) Jud. Act, 1873, s. 34; Griffith and Loveland's Pr. pp. 57-59.

(*o*) Jud. Act, 1875, s. 11.

(*p*) Ante, pp. 13, 14.

such other two Divisions as aforesaid ; that all causes, matters, and other proceedings, which by or under the Supreme Court of Judicature Act, 1873, or any Act amending the same, or any rule or order made pursuant thereto, have been or are assigned to the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division respectively, should in future be assigned to the Queen's Bench Division, to be formed by such consolidation and union as aforesaid ; that all proceedings which have heretofore, by any law or custom other than such Acts of Parliament, rules, and orders as aforesaid, been taken or had respectively in the Queen's Bench Division, the Common Pleas Division, and the Exchequer Division of the said High Court of Justice, should be in future taken and had in the Queen's Bench Division, to be so formed by such consolidation and union as aforesaid ; and that all powers and authorities which, by any law or custom have heretofore been exercised by the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer respectively, should in future be capable of being exercised by the Lord Chief Justice of England, unless such exercise thereof shall be contrary or repugnant to any express provision in any Act of Parliament contained.

To facilitate the prosecution in country districts of certain proceedings in an action, provision has been made for the establishment throughout the country of District Registries (*q*), where actions may be commenced and continued down to and including final judgment (*r*). Where an action proceeds in a District Registry the District Registrar may exercise all such authority and jurisdiction in respect of the action as may be exercised by a Judge in chambers, except such

(*q*) Jud. Act, 1873, s. 60, amended by Jud. Act, 1875, s. 13.

(*r*) As to the practice in district registries, see Jud. Act, 1875, Order xxxv. When an action may be removed from district registries, see post, pp. 80, 81.

as a Master of the Supreme Court is precluded from exercising (e); and particularly he may grant leave to issue or renew writs of execution, examine judgment debtors for garnishee purposes, grant garnishee orders, and grant charging orders (f). Causes for trial at the assizes may also be entered with the District Registrar for trial (u), and where an action proceeds in a District Registry all proceedings relating to the following matters, namely, (a) leave to issue or renew writs of execution, (b) examination of judgment debtors for garnishee purpose, (c) garnishee orders, and (d) charging orders *nisi*, shall, unless the Court or a Judge otherwise order, be taken in the District Registry (v).

Constitution of
Her Majesty's
Court of
Appeal. To deal secondly with her Majesty's Court of Appeal. This Court was until lately constituted by five *ex officio* Judges, viz., the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer; but there being now, in consequence of the recent Order in Council (x), no Chief Justice of the Common Pleas or Chief Baron of the Exchequer, there are now but three *ex officio* Judges, and there are in addition so many ordinary Judges as Her Majesty shall from time to time appoint, such ordinary Judges being styled "Justices of Appeal" (y). The former Lords Justices of Appeal in Chancery were made Judges of this Court, which at the present time, in addition to the *ex officio* Judges, has six Judges. The Judges of the Court (except the Lord Chancellor) hold their offices on the same terms as the Judges of the High Court of Justice (z). In addition to the Judges mentioned, the Lord Chancellor has power to request the attendance of any Judge of any Division

(s) Order xxxv. r. 4. As to which see post, p. 21, note (k).

(t) Rule 11 of April, 1880.

(u) Rules 3 and 4 of December, 1879.

(v) Rule 11 of April, 1880.

(x) As to which see ante, pp. 13, 14.

(y) Jud. Act, 1875, s. 4, amended by 39 & 40 Vict. c. 59, ss. 15, 19.

(z) See ante, p. 13.

of the High Court, except during the time of the spring or summer circuits, as an additional Judge (a).

All the jurisdiction and powers formerly vested in any of the following Courts or persons are now vested in this Court of Appeal, viz. : (1.) In the Lord Chancellor and Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction, and also as a Court of Bankruptcy Appeal. (2.) In the Court of Appeal in Chancery of the County Palatine of Lancaster, or of the Chancellor of the duchy and said county palatine. (3.) In the Lord Warden of the Stannaries, or in the Lord Warden sitting in his capacity of judge. (4.) In the Court of Exchequer Chamber; and (5) In Her Majesty in Council, or the Judicial Committee of the Privy Council, upon appeal from any judgment or order of the High Court of Admiralty, or from any order of lunacy made by the Lord Chancellor or any other person having jurisdiction in lunacy (b).

The sittings of the Court of Appeal, or in London or Middlesex of the High Court of Justice, are four in every year, viz. : (1.) The Michaelmas Sittings, which commence the 2nd of November and end the 21st of December; (2.) The Hilary Sittings, which commence the 11th of January and end on the Wednesday before Easter; (3.) The Easter Sittings, which commence on the Tuesday after Easter week and end on the Friday before Whit Sunday; and (4.) The Trinity Sittings, which commence on the Tuesday after Whitsun week and terminate on the 8th of August (c). These sittings are nearly identical with the formerly existing terms, which are abolished so far as they relate to the administration of justice (d). The Vacations that now exist are four, viz. : the Long, Christmas, Easter, and Whitsun (e), of which the Long is the same as hereto-

(a) Jud. Act, 1875, s. 4, amended by 39 & 40 Vict. c. 59, s. 19.

(b) Jud. Act, 1873, s. 18, and see Griffith and Loveland's Pr. pp. 15, 16.

(c) Order LXL, to which reference can be made for further details.

(d) Jud. Act, 1873, s. 26.

(e) Ibid.

fore, viz. : commencing the 10th of August and terminating the 24th of October, and during this time no pleading can be amended or delivered unless directed by a Court or Judge, nor is the time of the Long Vacation reckoned in the time allowed for filing, amending, or delivering any pleading unless otherwise directed by a Court or Judge (*f*). Besides this, where the time limited for doing any act is less than six days, Sunday, Christmas Day, and Good Friday are not counted, and where the last day for doing any act which cannot be done when the offices are closed, expires on a Sunday or other day when they are closed, it is considered duly done if done on the first day when the offices are open (*g*).

Circuits.

The powers of issuing commissions of assize are kept alive, subject to arrangements between the Judges of the High Court. The Judges of the Queen's Bench Division go circuit (*h*). There are always two circuits in each year, viz. : the winter circuit and the summer circuit, and in addition in some places there are other assizes; and by two recent Acts, viz., 39 & 40 Vict. c. 57 (amended by 40 & 41 Vict. c. 46) and 42 Vict. c. 1, several counties may under certain circumstances be united together for the purpose of the holding of assizes. The winter circuit begins in January, and the summer circuit in July. The Judges arrange amongst themselves who shall go on the different circuits. When the whole duties of the circuits cannot be performed by the Judges certain persons may be appointed Commissioners for the purpose of presiding thereat (*i*).

Officers of the Courts.

There are various officers of the Courts besides the Judges. In the Queen's Bench Division may be mentioned the Masters, the Associates, and the Sheriffs;

(*f*) Order LVII. rr. 4, 5.

(*g*) Order LVII. rr. 2, 3.

(*h*) Jud. Act, 1873, ss. 29, 37.

(*i*) Jud. Act, 1873, s. 29.

and in the Chancery Division, the Chief Clerks, the Registrars, the Paymaster-General, the Record and Writ Clerks, the Examiner, the Taxing Master, and the Conveyancing Counsel.

The Masters attend in Court during its sittings, also The Masters. in Chambers to dispose of various matters of lesser importance and to tax costs, and to dispose of matters referred to them by the Judges, *e.g.*, actions involving questions of account. They also receive money paid into Court (*k*).

The duties of the Associates are to enter causes for The Associates. trial, give certificates for judgment, in pursuance of the Judge's directions, and other like matters.

The duties of the Sheriffs are to carry out the judg- The Sheriffs. ment of the Court by enforcing the various writs of execution delivered to them.

The duties of the Chief Clerks are to attend in the The Chief Chambers of the various Judges of the Chancery Divi- Clerks.

(*k*) It has been specially provided that the Masters shall have no jurisdiction in certain matters, *viz.* :

All matters relating to criminal proceedings or to the liberty of the subject.

The removal of actions from one Division or Judge to another Division or Judge.

The settlement of issues, except by consent.

The granting of inspection under Order LII. r. 3.

Appeals from district registrars.

Interpleader, where all parties concerned consent to a final determination of the question in dispute without a jury, or special case, or where the sum in dispute is less than £50, and one of the parties desires such a determination. In such cases the question shall be determined by the Judge, unless the parties agree to refer it to the Master.

Prohibitions.

Injunctions and other orders under sub-sect. 8 of sect. 25 of the Act, or under Order LII. rr. 1, 2, and 3 respectively.

Awarding of costs other than costs of any proceeding before such Master.

Reviewing taxation of costs.

Acknowledgments of married women (Order LIV., amended by Rule 4 of November, 1878).

The granting leave for service out of the jurisdiction of a writ of summons or of notice thereof (Order LIV. r. 2a of June, 1876).

sion to whom they are attached and to take accounts and inquiries, with the assistance of junior clerks under them, and also to dispose of various interlocutory applications arising in the course of actions.

The Registrars. The duties of the Registrars are to enter causes for trial, to attend in Court and take minutes of the decision given, and afterwards to draw the same up in proper form and settle them in the presence of the different parties or their solicitors.

The Paymaster-General. The duties of the Paymaster-General are to keep the books in Chancery containing suitors' accounts of money paid into and out of Court, and draw cheques for suitors, and make investments in and bespeak sales of stock, according to the Court's orders.

The Record and Writ Clerks. The duties of the Record and Writ Clerks were to receive all proceedings, affidavits, &c., filed in the course of Chancery proceedings, to seal writs, and furnish office copies of affidavits, &c., when required.

The Examiners. The duty of the examiners is to preside at the examination of witnesses, in some cases.

The Taxing-Masters. The duties of the Taxing Masters are to tax solicitors' costs.

The Conveyancing Counsel. The Conveyancing Counsel are certain counsel appointed to assist the Court in matters of conveyancing; thus if property the subject-matter of Chancery proceedings is about to be sold, the matter will be referred to one of these officers to investigate the title and prepare the conditions of sale.

Supreme Court of Judicature (Officers) Act, 1879. With regard to some of the foregoing officers, the Supreme Court of Judicature (Officers) Act, 1879 (*l*),

must be borne in mind. That Act provided (*m*) that a central office of the Supreme Court of Judicature should be established under the control and superintendence of officers called Masters of the Supreme Court of Judicature, in which was to be concentrated and amalgamated the several offices following, and any other that may by rule of Court be directed, and there were to be transferred thereto the existing officers thereof, viz. : The Record and Writ Clerks office, the Enrolment office, the Report office, the offices of the Masters of the Queen's Bench, Common Pleas, and Exchequer Divisions, including the Bills of Sale office and also the offices of the Associates of those Divisions, the Crown office of the Queen's Bench Division, the Queen's Remembrancer's office, the office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women, and the office of the Registrar of Judgments. In addition it was provided that there should be transferred to such Central office such of the existing officers employed under the Registrars of the Probate, Divorce, and Admiralty Division, as the Judges of that Division should respectively select as necessary for the performance of the duties to be performed in the Central office ; and such other officers of and persons employed in the Supreme Court, or the offices thereof, as should be from time to time transferred to the Central office by Rule of Court. It was also enacted (*n*) that the business performed at the Central office should comprise business formerly performed in the various offices amalgamated, but the several officers are to be interchangeable and capable of performing any of the duties of the office, and subject thereto, the duties of each are to remain as before. By this Act also the name of the New Law Courts is to be the Royal Courts of Justice (*o*).

(*m*) Sects. 4-7.

(*n*) Sect. 12.

(*o*) Sect. 28.

It may be remarked that this Act is simply a further carrying out of the idea and design of the Judicature Acts, 1873 and 1875, and has more effect in name than in anything else.

Solicitors. Solicitors are also to a certain extent officers of the Court.

Referees and Assessors.

In addition to the foregoing, certain new officers have been appointed by the Judicature Act, 1873, viz., Referees and Assessors. Referees are persons to whom any matter is referred by the Court, and they may be either official referees, that is, permanent referees to whom any matters may be referred, or special referees, that is, persons specially chosen for the one particular case. Assessors are persons having peculiar or special knowledge in any matter before the Court, and called in to assist the Court in such matter. Subject to any right to have particular cases submitted to a jury, questions may be referred for *inquiry and report* to any official or special referee, and the Court may adopt such report, and if so adopted it may be enforced as the judgment of the Court. The Court may also in cases which cannot conveniently be tried by a jury order any question or issue of fact or any question of account arising therein to be tried before a referee (*p*). Any matters referred to the official referees (there are at present four of them) are distributed amongst them in rotation. A referee may hold the trial at or adjourn it to any place he may deem most convenient, have any inspection or view, and shall, unless otherwise directed by the Court or a Judge, proceed with the trial *de die in diem* in a similar manner as in an action tried before a jury. Subject to any order, evidence is to be taken before him and the attendance of witnesses enforced by subpoena, and the trial is to be generally conducted as nearly as circumstances will admit as

(*p*) *Pontifex v. Severn*, 26 W. R. 183.

trials before a Judge of the High Court, but not so as to make the tribunal of the referee a public court of justice (*q*). A referee also has no power of committing to prison or of enforcing any order by attachment or otherwise (*r*).

A referee may before the conclusion of any trial before him, or by his report under the reference made to him, submit any question arising therein for the decision of the Court, or state any fact specially, with power to the Court to draw inferences therefrom, and in any such case the order to be made on any such submission or statement is entered as the Court may direct; and the Court has power to require any explanations or reasons from the referee, and to remit the cause or matter or any part thereof for re-trial or further consideration to the same or any other referee, or the Court may decide the question referred to any referee on the evidence taken before him, either with or without additional evidence as the Court may direct (*s*).

Question arising before Referees.

Finally, we should notice the ultimate Court of Appeal, viz., the House of Lords, and to deal with this in its origin it is necessary for us to go back to very ancient times. It would appear that in the earliest times the House of Lords was possessed of both an original and an appellate jurisdiction in Common Law matters, both of which fell into disuse; and it seems that the House of Lords had not then any jurisdiction in appeals from Chancery. About the time of the Restoration an attempt was made by the Lords to regain both the former jurisdictions, which, though unsuccessful with regard to its original, was successful with regard to its appellate jurisdiction; and at about the same time an appeal in Chancery matters was usurped, and after

Origin of its jurisdiction as a Court of Appeal.

(*q*) Jud. Act. 1873, ss. 56-59, 83; Order xxxvi. rr. 28-34.

(*r*) Order xxxvi. r. 33.

(*s*) Order xxxvi. r. 34 of March, 1876.

a struggle successfully so, and the jurisdiction of the House of Lords as an ultimate Court of Appeal has not since been questioned (*t*).

The constitution of the House of Lords as a Court of Appeal.

Appellate Jurisdiction Act, 1876.

But the constitution of the House of Lords as an ultimate appellate Court has in modern times been found not to be altogether satisfactory, and consequently, by the Judicature Act, 1873 (*u*), it was proposed to abolish its jurisdiction. This provision was, however, first suspended in its operation (*w*), and then was passed the Appellate Jurisdiction Act, 1876 (*x*), which repeals the former provision, and perpetuates the House of Lords as the ultimate Appellate Court with an improved constitution. By it provision is made for the appointment of two Lords of Appeal in ordinary for the House of Lords (*y*), and it is enacted that no appeal shall be heard and determined there unless there are present not less than three Lords of Appeal, to consist of the following persons: (1) the Lord Chancellor for the time being, (2) the Lords of Appeal in Ordinary, and (3) such Peers of Parliament as are for the time being holding or have held any high judicial offices (*z*). The Act also provides that appeals may be heard and determined notwithstanding Parliament may not be then sitting.

This must conclude our remarks on the Courts; and in next proceeding to the practice in them, we would

(*t*) See Brown's Law Dict. 2nd ed. p. 261, tit. 'House of Lords, Jurisdiction of'; Haynes' Outlines of Equity, pp. 62-66. See also the judicial powers of the Lords historically traced in Hallam's History of England, vol. iii., p. 17, *et seq.*

(*u*) Sect. 20.

(*w*) Jud. Act, 1875, s. 2.

(*x*) 39 & 40 Vict. c. 59.

(*y*) Sect. 6.

(*z*) Sect. 5. 'High Judicial office,' means any of the following offices, viz.: The Office of Lord Chancellor of Great Britain or Ireland, or of paid Judge of the Judicial Committee of the Privy Council, or of Judge of one of Her Majesty's Superior Courts of Great Britain and Ireland, sect. 25.

only remind the student of what has already been once stated, viz., that the practice, though for the main part regulated by the Judicature Acts and the rules thereunder, yet is not entirely so, the Act of 1873 (a) providing that where no special provision is made, the practice of the Courts is to be as nearly in the same manner as it might have been exercised previously by the Courts from which the jurisdiction was transferred (b).

(a) Sect. 23.

(b) Generally on any points occurring in this chapter as to which the student may require further information or explanation he is referred to Griffith and Loveland's Practice.

CHAPTER III.

PARTIES TO ACTIONS AND JOINDER OF CAUSES OF ACTION.

BEFORE commencing any action in the High Court it is very important to consider carefully who are the necessary parties to any such action, both in the capacity of plaintiffs and defendants, and how such parties should sue and be sued, and also any preliminary formalities that may, under certain circumstances, have to be observed.

Non-joinder of plaintiffs or defendants.

In the first place a right may be vested in several persons jointly, and if so they must sue together ; or again, certain persons may be liable only jointly, and if so they must be sued together. The non-joinder, however, of either plaintiffs or defendants is not in any way fatal to the action. In the event of non-joinder of persons who should have been joined in the action as co-plaintiffs, the Court, if satisfied that the non-joinder was through mistake, and that it is necessary to do so, may order any person or persons to be added as plaintiffs on such terms as may seem just, his or their consent being given thereto (c). The non-joinder of defendants may also equally be rectified, for they may be joined by leave of the Court or a Judge (d). In this latter case the course of practice is for the plaintiff to file an amended copy of and sue out a writ of summons and serve such new defendant therewith, and any statement of claim which has been delivered is also amended and

(c) Order xvi. rr. 2, 13, 14.

(d) Ibid. rr. 13, 14.

served along with the writ or within four days after appearance (*e*).

In the next place it may happen that a person is sometimes, through mistake, wrongly joined as a plaintiff or wrongly made a defendant; but the misjoinder of either plaintiff or defendant is not in any way fatal to the action. In the event of misjoinder of persons as plaintiffs or defendants judgment may be given for or against such one or more as may be found entitled or found liable without any amendment, and the Court or a Judge, on such terms as may appear just, may order that the name or names of any party or parties improperly joined, whether as plaintiffs or defendants be struck out; and generally no action is defeated by any misjoinder, but a defendant is entitled to any extra costs occasioned by the plaintiff's misjoinder (*f*). The Court or a Judge also, if satisfied that a person wrongly made plaintiff has been so made by mistake, may order any other person or persons to be substituted (*g*).

Misjoinder of plaintiffs or defendants.

Substitution of plaintiff.

It is not at all necessary that the defendants to an action should all be interested to the same extent, but the Court or a Judge may make such order as may appear just to prevent any defendant being embarrassed or put to expense when he may have no interest (*h*). A plaintiff is able if several persons are liable on a contract to join them all in the same action (*i*): and if he is doubtful, whether in contract or otherwise, against which of two or more persons he can sustain a claim, he may join them all in one action, to the intent that the question as to which is liable and to what extent may be determined (*k*).

Interest of defendants, &c.

(*e*) Order xvi. rr. 15, 16.

(*f*) Ibid. rr., 1, 3, 13.

(*g*) Ibid. r. 2. On the subject of non-joinder and misjoinder, see further, Griffith and Loveland's Pr. pp. 222-250.

(*h*) Ibid. r. 4.

(*i*) Ibid. r. 5.

(*k*) Ibid. r. 6.

Parties represented by trustees.

Trustees, executors, and administrators may sue and be sued on behalf of or as representing the property or estate of which they are trustees or representatives without joining any of the parties beneficially interested in the trust or estate, and they are considered as representing such parties in the action; but any such persons may, at any stage of the proceedings, be added as parties thereto (*l*).

Several parties with same interest.

Where there are numerous parties having the same interest, any one of such persons may sue, or be sued, or be authorised by the Court to defend such action on behalf of the others (*m*); and where in any case there may be a doubt on some construction who may be entitled as heir-at-law or next of kin, some person may be appointed by the Court to represent such person or persons (*n*).

Consolidation of actions.

Actions in any Division or Divisions may be consolidated by order of the Court or a Judge in the manner before in use in the Superior Courts of Common Law (*o*). This is nothing new; when several actions are brought by the same plaintiff against several defendants, and the questions in dispute and the evidence to be adduced are the same in all, the plaintiff will, though there is no joint liability, be put to his election in which one he will proceed, and proceedings in the rest will be stayed on the defendants in the other actions submitting to be bound by the verdict in the one trial. This practice, it is said, was originally introduced by Lord Mansfield in actions against underwriters in insurance cases, and the idea is to save useless expenditure. When necessary the actions will be divided into classes, and all but one in each class stayed. In ejectment cases also, where the title is the same, several actions will be consolidated.

(*l*) Order XVI. r. 7.

(*m*) Ibid. r. 9.

(*n*) Ibid. r. 9a.

(*o*) Order LI. r. 4.

The Court will not, however, stay proceedings where the plaintiffs in the several actions are different, though the defendants are the same. It may be noticed that the consolidation order does not bind the plaintiff, so that notwithstanding a verdict against him in one action he may proceed with the other or others (*p*).

It seems that when actions are consolidated all the defendants are liable to the plaintiff for the costs of the action that is tried, and that they stand to one another in the relation of joint defendants, so as to be liable to contribution for those costs (*q*).

It sometimes happens that when a defendant's defence is put in it is found to contain some counterclaim which raises questions not only between the plaintiff and defendant, but also between third persons not parties to the action. In such a case the proper course is for the defendant in his defence to add a further title similar to the title in a statement of claim, setting forth the names of all such persons, and to deliver his defence indorsed with the form provided, to them within the time within which he is required to deliver it to the plaintiff, and the action then proceeds against them in exactly the same way as if they had been made parties thereto, and any such third party may deliver a reply within the time within which he might deliver a defence if it were a statement of claim (*r*). A simple instance of this would be as follows:—A. sues B.; B. has a counterclaim against A. and C. B. is by this provision enabled to set it up in the action brought by A., bringing in C. as above detailed.

Again, it may happen that a person who is being sued claims, in the event of a judgment being recovered against him, contribution from some third person not a party to the action, or there may be from some other

(*p*) Griffith and Loveland's Pr. pp. 433, 435.

(*q*) Ibid. 435.

(*r*) Order XXII. rr. 5–8, and Order XXIX. r. 13.

Application for
directions.

cause a question in the action which ought to be determined not only as between the plaintiff and defendant, but in addition, between some other person. To prevent such third person afterwards contesting the validity of the judgment that may be obtained against him, the defendant may adopt a course that will bind him with it just as much as if he had been a party. This course is as follows: the defendant, within the time for delivering his statement of defence, by leave of the Court or a Judge, issues and serves such third person with a notice of his claim stamped with the seal of the Court, together with a statement of the plaintiff's claim, or if there is not one, then with a copy of the writ in the action. If the third person desires to dispute all liability he can enter an appearance within eight days from the service of the notice, or after that time may be allowed to appear by the Court or a Judge. After his appearance, the party giving the notice applies to the Court or a Judge for directions as to the mode of determining the questions in the action, and leave to such third person to defend may be given on such terms as may seem just, and generally all proper directions may be given. If the third person, after being served as above stated, does not appear, the effect is simply this: not that the plaintiff or defendant can get any judgment against him, but that in any proceedings to recover contribution that may subsequently be taken against him by the defendant, he is deemed to have admitted the validity of the judgment that may have been obtained against the defendant in the action, whether obtained by consent or otherwise (s). A simple instance of the effect of this provision is found in an action against one of two or more sureties.

Death, &c., of
parties.

If in the course of an action one of the parties dies or becomes bankrupt, or a female party marries, or if in any way any devolution of estate of any party to the

(s) Order xvi. rr. 17-21; Griffith and Loveland's Pr. pp. 244-250.

action occurs by operation of law, the action does not abate, but an order may be made *ex parte* for the personal representative, trustee, husband, or other successor in interest (if any) to be made a party to the action or to be served with notice thereof, and such order as may be just may be made for disposal of the action. On service of any such order the new party must enter an appearance within the same time and in the same manner as if served with a writ of summons (*t*).

Different causes of action may be joined in the same action in most cases, but if it appears to the Court or a Judge that they cannot be conveniently tried together, separate trials may be ordered, and any defendant may apply, alleging that such causes of action cannot be conveniently disposed of together, and the Court or a Judge may order any such causes to be excluded (*u*). Except, however, by special leave, an action for recovery of land cannot be joined with any other cause of action except in respect of mesne profits, or arrears of rent, or damages for breach of any contract under which the same or any part thereof is held (*v*); nor, except by like leave, can claims by a trustee in bankruptcy as such be joined with any other claim by him in any other capacity (*w*). Claims by or against an executor or administrator as such may only be joined with claims by or against him personally when such last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator (*x*).

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendants (*y*). Persons not *sui juris* suing or being sued.

Infants must sue by next friend and defend by

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- (*t*) Order L. rr. 1-7.
 - (*u*) Order XVII. rr. 1, 8, 9.
 - (*v*) Ibid. r. 2.
 - (*w*) Ibid. r. 3.
 - (*x*) Ibid. r. 5.
 - (*y*) Ibid. r. 6.

guardian *ad litem*. Married women usually sue and defend together with their husbands, but if not, then they sue in the same manner as infants, but the Court or a Judge may authorize them to sue or defend by themselves on giving such security (if any) for costs as the Court or a Judge may require. Also by the Married Women's Property Act, 1870 (z), a married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this Act declared to be her separate property, or of any property belonging to her before marriage and which her husband has by writing under his hand agreed with her shall belong to her after marriage as her separate property. Also when, under the provisions of the Divorce Act (a), she has obtained a judicial separation (b) or a protection order (c) she may sue or be sued as a *femme sole*. She also stands in a like position where her husband is banished or transported or suffering sentence of penal servitude, or where he has not been heard of for a period of seven years and is therefore presumed to be dead. Subject to these cases, however, except by leave of the Court, whenever a married woman is sued her husband must be joined as a defendant with her (d). Lunatics and persons of unsound mind sue by their committees or by next friend, and defend by their committees or guardians appointed for that purpose (e). In practice a next friend or guardian *ad litem* is usually some person closely connected with the plaintiff or defendant, but there is no rule that this must be so. The next friend of a plaintiff is liable for the due prosecution of the action and for the costs of it, and he therefore has to sign a consent expressing his willingness to act as next friend, which consent is filed with the writ. The guardian of a defendant

(z) 33 & 34 Vict. c. 93, s. 11.

(a) 20 & 21 Vict. c. 85.

(b) Sect. 25.

(c) Sect. 21.

(d) Order XVI. r. 8; Griffith and Loveland's Pr. p. 229.

(e) Order XVIII.

incurs no such liability for costs; he is appointed as a matter of course on a petition supported by affidavit of his fitness and of his having no interest adverse to the party.

Corporations sue and are sued in their corporate names, and the solicitor by whom they defend should be appointed under their common seal. Railway companies and joint stock companies also sue and are sued in their corporate names. Certain banking and other companies however, by virtue of various statutes, sue and are sued in the name of one of their public officers (*f*).

Corporations,
companies, &c.

Actions comprising matters of a public nature must be commenced in the name of the Attorney-General; the person at whose instance they are commenced, and who for all practical purposes is the plaintiff, being called the relator.

Matters of a
public nature.

Although it is usual in practice to give notice to a defendant before bringing an action against him, it is not generally necessary. The chief case in which such notice must be given is in an action against a justice of the peace for anything done by him in the execution of his duty. A month's notice prior to the action being commenced must here be given (*g*). Also when any action is intended to be brought against a constable who has acted under a warrant, demand in writing must be made of the perusal and copy of the warrant six days before commencing an action against him. If this is granted within that time, the justice who granted the warrant must be joined as a co-defendant, and then the mere production of the warrant at the trial will entitle the constable to a verdict, though if the justice had no jurisdiction the plaintiff will recover against him; if not granted within the six days the action may then be commenced against the constable alone (*h*).

Notice before
action.

(*f*) See hereon Arch. Pr. 13th Ed. p. 976, *et seq.*

(*g*) Ibid. pp. 1073-1080.

(*h*) Ibid.

PART II.

OF THE PRACTICE AS SPECIALLY OCCURRING IN THE QUEEN'S BENCH DIVISION.

CHAPTER I.

PROCEEDINGS TO APPEARANCE.

PROCEEDINGS are commenced by an action, which is ^{An action.} defined as the means of recovering in a Court of Justice what is due and owing to oneself (*a*). The first step in ^{Writ of} an action is a writ of summons (*b*), which may be issued ^{summons.} in London, or (except in Probate cases) in a district registry (*c*). It is written or printed, or partly written and partly printed (*d*). This writ is tested in the name of the Lord Chancellor; or if that office is vacant, in the name of the Lord Chief Justice of England (*e*), and specifies the Division to which it is intended that the action should be assigned, states the plaintiff's and defendant's names, and summonses the defendant to appear. It is indorsed with short particulars of the ^{Indorsements.} plaintiff's claim, so as to shew the defendant at once the nature of the demand made against him, and in proper cases with the special indorsement presently mentioned. The address of the plaintiff and the name and address of the solicitor issuing the writ must also be

(*a*) Brown's Law Dictionary, 2nd Ed. p. 11, tit. 'Action.'

(*b*) Order II. r. 1. See form in Appendix, post, p. 195.

(*c*) Order v. r. 1

(*d*) Ibid. r. 6.

(*e*) Order II. r. 8.

indorsed, and if he is an agent, then the two names must be indorsed. There must also be indorsed an address for service, which if the writ is issued from London must be within three miles of Temple Bar, and if from a district registry, within the jurisdiction of such registry; and if defendant does not reside within the registry, then in addition an address within three miles of Temple Bar (*f*). If the plaintiff sues in person, then he must indorse upon the writ his place of residence and occupation, and if that is more than three miles from Temple Bar, then also an address for service within that distance; and if the writ is issued from a district registry and he resides beyond it, then an address for service within the registry, and when the defendant does not reside within the registry, then, in addition, an address within three miles of Temple Bar. If the writ is specially indorsed, as mentioned in the next paragraph, the amount claimed for debt and cost respectively must be indorsed, and also a notice that upon payment thereof within four days after the service (or in the case of a writ not for service within the jurisdiction within the time allowed for appearance), further proceedings will be stayed. If defendant does so pay, he is nevertheless entitled to have the costs he pays taxed, and if more than one-sixth is disallowed, the plaintiff's solicitor pays the costs of taxation (*g*). However, this would but rarely occur, as there is a recognised amount for costs to be indorsed on writs, viz., £2 10s, and in country cases or in cases not within the district registry from which the writ is issued, £3 3s. After service the person serving the writ should within three days indorse on it the day of the month and week of the service thereof, otherwise the plaintiff cannot, on non-appearance of the defendant, proceed to judgment by default as detailed in the next chapter, as every

(*f*) Order IV.

(*g*) Order III. r. 7.

affidavit of service of the writ must mention the day on which this indorsement was made (*h*). This however, only applies where personal service has been effected, and not to a case of substituted service, in which case no such indorsement is necessary (*i*). In the Appendix will be found the form of a writ of summons (*j*).

If the plaintiff seeks merely to recover a debt or liquidated demand in money payable under any contract, or a fixed sum payable under any statute, the writ may be specially indorsed with the particulars of the amount sought to be recovered after giving credit for any payment or set-off. The advantages of this special indorsement are three, viz., (1) that if the defendant does not appear within the proper time, the plaintiff may at once sign final judgment and issue execution (*k*); (2) that even if he does appear, an application for leave to sign judgment, notwithstanding the appearance, may be made under Order xiv. (*l*); and (3) that in the event of pleadings being necessary the plaintiff may deliver a notice in lieu of statement of claim (*m*). These points will be presently further noticed.

The writ having been issued, the next step is to effect service of it. In some cases the defendant's solicitor will accept service and undertake to appear, and if having done this he does not then appear he is liable to attachment (*n*), but more usually actual service has to be effected. When practicable this service is personal, by delivering to the defendant a copy of the writ, and at the same time producing to

(*h*) Order ix. r. 13.

(*i*) Griffith and Loveland's Pr. p. 191.

(*j*) Post, p. 195.

(*k*) Post, p. 48.

(*l*) Post, p. 52.

(*m*) Post, p. 57.

(*n*) Order xii. r. 14.

him the original (*o*); but if it is made to appear to the Court or a Judge that this personal service cannot be promptly effected, an order for substituted or other service may be made (*p*), *e.g.*, on some person connected with defendant, or by advertisement, &c. (*q*).

Service on
particular
persons.

When husband and wife are both defendants, it is sufficient to serve the husband, but the Court may order that the wife shall be served with or without service on the husband (*r*). Where the defendant is an infant, the writ is served on his father or guardian, or if none, on the person with whom or under whose care he resides, unless otherwise ordered; but service on the infant *may* be ordered to be good service (*s*). Where the defendant is a lunatic or person of unsound mind, the writ is served on his committee or person with whom he resides, or under whose care he is, unless otherwise ordered (*t*). If the defendant is a corporation aggregate, the writ is served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary (*u*). Railway and other similar companies may be served by the writ being left at or transmitted through the post to the principal office of the company or one of their principal offices where there shall be more than one, or by being given personally to the secretary, or, if no secretary, to a director of the company (*v*). Companies registered under the Companies Act, 1862 (*w*), may be served by leaving the writ, or sending it through the post in a prepaid letter addressed to the company, at their registered office (*x*).

Suing and
service of
partners.

A new provision as to the suing and service of part-

(*o*) Strictly speaking, the original need not be produced unless asked for by defendant. The practice is invariably as above stated.

(*p*) Order IX. r. 2.

(*q*) See remarks hereon in Griffith and Loveland's Pr. pp. 182-187.

(*r*) Order IX. r. 3.

(*s*) Ibid. r. 4. As to the course to be taken on the non-appearance of an infant or person of unsound mind so served, see post, p. 51.

(*t*) Order IX. r. 5.

(*u*) Com. Law Proc. Act, 1852, sect. 16; Arch. Pr. 13th Ed. p. 234.

(*v*) 8 & 9 Vict. c. 16, s. 135; Arch. Pr. 13th Ed. p. 964.

(*w*) 25 & 26 Vict. c. 89.

(*x*) Sect. 62.

ners, or of a person carrying on business in the name of a firm, calls for special notice. The old practice was, that on suing a partnership firm the plaintiff must find out who were the members of the firm, and name them and serve them individually as defendants, in the same way that when partners were suing they had to be individually named. Now partners may not only sue but may be sued in the name of their partnership firm (*y*), and service effected upon any one or more of them, or at their principal place of business within the jurisdiction, upon any person having at the time of the service the control or management of the business there (*z*); and so also when any one person carries on business in the name of a firm apparently consisting of more than one person, he may be sued in the name of such apparent firm, and the writ may be served in the same way upon any person having at the time of the service the control or management of the business there (*a*). It will be observed that this latter provision only applies to being sued and not to the case of suing.

Where a writ is issued in which the plaintiff or plaintiffs is or are suing under a firm name, the defendant may demand in writing the names and places of residence of the person or persons constituting the firm, and all proceedings may, on application, be stayed till furnished ; or application may be made by summons to a Judge for a statement of the name of such persons to be verified on oath or otherwise as the Court shall direct (*b*).

Demand for
name of
partners.

In the case of an action to recover land, if the possession is vacant and service cannot be effected otherwise, it may be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property (*c*).

Service in case
of vacant pos-
session.

(*y*) Order XVI. r. 10.

(*z*) Order IX. r. 6.

(*a*) Ibid. r. 6*a*. As to appearance of partners so sued, see post, p. 45 ; and as to execution when writ issued in this way, see post, pp. 105, 106.

(*b*) Order VII. r. 2, and Order XVI. r. 10.

(*c*) Order IX. r. 8.

When defendant out of jurisdiction.

When a defendant is residing out of the jurisdiction no writ of summons can be issued against him without leave of the Court or a Judge (*d*). Every application for such leave must be supported by an affidavit shewing that the whole or part of the subject-matter of the action is property within the jurisdiction, or that some act, deed, will, or thing affecting such property, or a contract sought to be enforced, rescinded dissolved, annulled, or otherwise affected, or for the breach whereof damages or other relief are or is demanded, was made or entered into within the jurisdiction, or that there has been a breach within the jurisdiction of any contract wherever made, or that some act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or is situate within the jurisdiction. Also when the action is brought upon or in respect of any contract, it is necessary to shew the amount or value of the property in dispute or sought to be recovered; and if the defendant is resident in Scotland or Ireland, whether there is any local Court of limited jurisdiction having jurisdiction in the matter in question, and the comparative cost and convenience of proceeding in England or in the place of such defendant's residence. The affidavit must always shew where the defendant may probably be found, and whether he is a British subject or not (*e*). If the defendant is not a British subject notice of the writ is served instead of a copy (*f*). Neither a Master nor a District Registrar can give leave for service of a writ or notice thereof out of the jurisdiction (*g*).

When service may be effected.

Service may be made at any hour of the day or night, and on any day not being a Sunday or *dies non*, such as Christmas Day or Good Friday (*h*); a writ,

(*d*) Order II. r. 4.

(*e*) Order XI.

(*f*) Griffith and Loveland's Pr. p. 159.

(*g*) Order LIV. r. 2*a*.

(*h*) Griffith and Loveland's Pr. pp. 184, 185.

however, only remains in force for twelve months; but ^{How long} where it has not been served it may, by leave, be ^{writ in force.} renewed for six months, and so on from time to time, on satisfying the Judge or Registrar that reasonable efforts have been made to serve it, or for other good reason. This renewal is effected by the writ being marked at the proper office with a seal bearing the date of renewal (*i*).

Concurrent writs are sometimes issued (*k*). They ^{Concurrent} are simply duplicate originals, and would only be issued ^{writs.} for the sake of expedition, *e.g.*, where there are several defendants residing at different places (as each is entitled, as before mentioned (*l*), to see the original on service), or where it is doubtful where a defendant is residing or is to be found.

The Court or a Judge may at any stage of the pro- ^{Amendment} ceedings, allow the plaintiff to amend his writ of ^{of writ.} summons in such manner and on such terms as may seem just (*m*). A writ cannot be amended without leave, though a statement of claim or of set-off and counterclaim in certain cases can be (*n*).

Service having been effected, the next step in the ^{Appearance.} action is for the defendant to appear to the writ, which appearance should be entered at the Central office or the district registry, as the case may be, within eight ^{Time for.} days from service, inclusive of day of service (*o*), except in the case of writs issued against a defendant out of the jurisdiction, when the time is fixed by the Court or a Judge on the leave being granted to issue the

(*i*) Order VIII. The only apparent use in renewing a writ instead of issuing a fresh one is where the debt would, but for the process, be barred by the Statute of Limitations.

(*k*) Order VI.

(*l*) Ante, p. 40; and note (*o*).

(*m*) Order XXVII. r. 11.

(*n*) See post, pp. 65, 66.

(*o*) See form of writ in Appendix A. to Jud. Act, 1875, Part I.

What it is, and how entered. writ, and varies according to the distance of defendant from England (*p*). By appearance is meant the mode of the defendant bringing himself before the Court, and it simply consists in the defendant in person, or by his solicitor, giving in at the proper office a memorandum in writing dated the day of its delivery, bearing the proper Court stamp, and signifying that he appears, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. At the same time also there must be delivered to the officer a duplicate of the memorandum, which the officer seals with the official seal, shewing the date on which it is sealed, and returns to the person entering the appearance, and the duplicate memorandum so sealed constitutes a certificate that the appearance was entered on the day indicated by the seal, and it is dealt with as presently mentioned (*q*). The memorandum of appearance, if the appearance is entered by a solicitor, must contain his place of business; and if entered in London, an address for service not more than three miles from Temple Bar; and if entered in a district registry, an address for service within the district (*r*). If the writ is issued in London the appearance must be in London also; if it is issued from a district registry, then, if the defendant resides or carries on business within the district, he must appear there, but if it is issued in the district and he does not so reside or carry on business, he can appear either in London or in the district registry, and in such case the action then proceeds in London, subject to this, that if the Court or a Judge is satisfied that the defendant appearing in London is a merely formal defendant or has no substantial cause to interfere in the conduct of the action, such Court or Judge may order that the action may proceed in the district registry notwithstanding such appearance in London (*s*). The defendant should, as

(*p*) Order XI. r. 4.

(*q*) Rule 6 of April, 1880.

(*r*) Order XII. r. 8.

(*s*) Ibid. rr. 1-5.

before stated, appear within the eight days, for in default thereof the plaintiff may proceed to judgment, as mentioned in the next chapter; but if he does not, he may still appear if the plaintiff has not yet signed judgment. It is now necessary that the defendant on the day on which he enters an appearance to a writ of summons, should give notice of his appearance to the plaintiff's solicitor, or, if the plaintiff sues in person, to the plaintiff himself. The notice may be given either in writing served in the ordinary way at the address for service, or by prepaid letter directed to that address and posted on the day of entering appearance in due course of post, and it must in either case be accompanied by the sealed duplicate memorandum before referred to (s). Under this rule it is not, therefore, now necessary for a plaintiff to search for appearance (t). Notice of appearance, &c.

When partners are sued in their firm's name, or where any person carrying on business in the name of a firm is sued in the firm name (u), the appearance must be in the individual names or name, but all subsequent proceedings continue in the name of the firm (x). Appearance by partners sued in firm's name.

Any person not named as a defendant in a writ of summons for the recovery of land, may by leave of the Court or a Judge appear and defend on filing an affidavit shewing that he is in possession of the land by himself or his tenant (y). If a defendant in appearing to such an action only claims a title to some portion of Appearance by person not named in writ in action to recover land.

(s) Rule 5 of April, 1880.

(t) Formerly it was customary for the defendant on appearing to give notice thereof to the plaintiff, but this was not necessary unless he had either appeared elsewhere than where the writ was issued or after the proper time for appearance; in either of which cases he must have, on the day of appearing, given notice to the plaintiff's solicitor—or if the plaintiff was suing in person, to the plaintiff himself—of the fact of his appearance. The plaintiff or his solicitor could always ascertain for himself whether or not the defendant had appeared by making a search for appearance at the proper office.

(u) See ante, pp. 40, 41.

(x) Order XII. rr. 12, 12a. As to execution where defendants are sued in this way, see post, pp. 105, 106.

(y) Order XII. r. 18.

the lands which are sought to be recovered, he may, in his appearance, or in a notice signed by himself or his solicitor to be served within four days after appearance, limit his defence to the part in respect of which he desires to defend (z).

Demand on
solicitor as to
issuing of writ.

Any defendant who has appeared to a writ of summons is entitled to demand in writing from the solicitor whose name appears as issuing the writ, whether or not it has been issued by his authority, and if he answers in the negative, all further proceedings are to be stayed (a).

Proceedings
under Bills of
Exchange
Act, 1855.

Proceedings under the Bills of Exchange Act, 1855 (b), though they cannot now take place, should still, however, be referred to. Under that Act, it was enacted that when a bill of exchange or promissory note (which words included cheques) was not more than six months overdue, a writ might be issued, the time to appear to which was to be twelve days, and which writ must be personally served on the defendant, who could not appear thereto as a matter of right, but only by obtaining leave to do so from a Judge within the twelve days limited for appearance, which leave would be granted on his paying into Court the sum indorsed upon the writ, or satisfying the Judge by affidavit that he had some good defence. This leave might be granted on such terms as to security or otherwise as to the Judge might seem fit (c). If the defendant obtained leave and duly appeared, the proceedings went on as in other actions (d).

Advantage of
the Act.

The advantage of this Act at the time it was passed was great, for it prevented a defendant in such cases from unduly delaying the plaintiff. Under the practice then existing any defendant by simply appearing could

(z) Order XII. r. 21.

(a) Order VII. r. 1.

(b) 18 & 19 Vict. c. 67.

(c) Ibid. s. 2.

(d) As to which see post, Chaps. 3, 4, and 5.

put it upon the plaintiff to proceed throughout all the different stages of the action, which was a great hardship upon a plaintiff where the defendant had no real defence. This was specially apparent in the case of actions on bills, notes, and cheques—hence the Act. However, after the coming into operation of the Judicature Acts, by reason of the provisions of Order xiv. (e), there no longer remained any reason for the special procedure under the Bills of Exchange Act, and it was considered advisable that no more writs should be issued under it. It was therefore provided by the Rules of April, 1880 (f), that no writ should thereafter be issued under the Bills of Exchange Act. It will be observed that the Act is not repealed, and still, therefore, remains in force beyond the High Court of Justice, so that such twelve days summonses may still be issued from the County Courts.

To return, the defendant having appeared, the pleadings now commence, but prior to considering them the subject of judgment in default of appearance, and applications under Order xiv. just referred to, must be considered, and this is done in the next chapter (g).

(e) See post, pp. 52, 53.

(f) Rule 3 of April, 1880, annulling Order II. r. 6.

(g) At the commencement of this chapter it was stated that proceedings are commenced by an action, which is strictly correct; but it is advisable here to notice the process of replevin, in which certain steps are taken prior to the action—the subject not being of sufficient importance to justify separate notice in a work like the present. Replevin is the redelivery of goods wrongfully taken from a person, occurring usually in cases of wrongful distress. The *modus operandi* is for the person whose goods are wrongfully taken, to apply in the first instance to the Registrar of the District County Court, and before him enter into a bond with sureties, which is called the replevin bond. If the person desires to commence his action in the High Court, the conditions of the bond are to commence the action within one week, and to prosecute the same with due effect, to prove before the Court that he had good ground for believing either that some question of title was involved, or that the rent or damage exceeded £20, and to return the goods if their return is ordered. If, however, the action is to be commenced in the County Court, the conditions of the bond are only to commence the action within one month, and to prosecute the same with due effect, and to return the goods if their return is ordered. On the bond being given the goods are returned to the person giving it (called the replevisor), and he commences the action, so that the defendant in the action is to a certain extent in the position of a plaintiff in an ordinary action (17 & 18 Vict. c. 125, ss. 22–24; 19 & 20 Vict. c. 108).

CHAPTER II.

JUDGMENT IN DEFAULT OF APPEARANCE, AND APPLICATIONS
UNDER ORDER XIV.

THE writ of summons, as has been stated in the last chapter, requires the defendant to enter an appearance within eight days from service. If the defendant does not obey this by appearing, the plaintiff's next step is to proceed on his default, but the courses he can take differ according to the nature of the writ issued, and therefore each must be considered separately.

Non-appear-
ance to
specially
indorsed writ.

Firstly.—*The writ may have been specially indorsed (h).* In this case, if the defendant does not appear within the eight days, the plaintiff may file an affidavit of service, and of the indorsement of the fact of the service on the writ within three days afterwards, and of the non-appearance of the defendant, and on this he may at once sign final judgment and issue execution; if there are several defendants, and some one or more only do not appear, he may sign final judgment and issue execution against the defendant or defendants not appearing, and proceed with his action against the other or others appearing. This judgment may be for any sum not exceeding the sum indorsed on the writ, with interest at the rate specified (if any) to the date of the judgment, and an amount for costs (i). The proper amount for costs, if the case is a town one, is £3 14s.; and if a country or agency case, £4 6s.

Costs.

(h) See ante, p. 39.

(i) Order XIII. rr. 3, 4.

By a final judgment is meant one which is complete, and requiring no further act to be done to perfect it; an interlocutory judgment is one requiring something further.

When a defendant fails to appear to a writ issued out of a district registry, and he had the option of appearing there or in London (*k*), judgment by default of appearance cannot be entered until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought in due course of post to have reached him (*l*).

Secondly.—The writ may have been for a debt or liquidated demand but yet not indorsed with the necessary particulars to constitute a special indorsement. In this case, on non-appearance within the eight days, the plaintiff must file the like affidavit of service, and in addition a statement of the particulars of his claim, so as thereby to supply the information which might have been given by a special indorsement, and then after waiting eight further days he may sign final judgment and issue execution (*m*).

Thirdly.—The writ may be not for a debt or liquidated demand, but for a detention of goods and pecuniary damages or either of them. Here, on non-appearance within the eight days, the plaintiff may, on affidavit of service and non-appearance, at once sign interlocutory judgment and then issue a writ of inquiry with a view to final judgment; or the Court or a Judge may order that instead of a writ of inquiry the damages shall be ascertained in any way in which any question arising

(*k*) See ante, p. 44.

(*l*) Order XIII. r. 5a. See remarks on this rule in Griffith and Loveland's Pr. pp. 212, 213.

(*m*) Ibid. r. 5.

in an action may be tried (*n*), *e.g.*, by referring the matter to one of the Masters.

Writ of inquiry.

A writ of inquiry is a writ issued to a sheriff commanding him to summon a jury and assess the amount of the damages. The under-sheriff usually presides at the assessment, and after the verdict is given the sheriff's return to the writ is made, and after four days final judgment may be signed, unless the officer who presided certify that in his opinion judgment ought not to be entered until the defendant has had an opportunity to apply to the Court to set the finding aside and grant a new writ of inquiry (*o*). A notice of executing the writ of inquiry must be given to the defendant, or if he has appeared by solicitor, then to his solicitor, and the notice must be of the same length of time as an ordinary notice of trial (*p*). If it is intended to attend the inquiry by counsel, notice to that effect should also be given, otherwise the costs of counsel will not be allowed. At the hearing of the inquiry all the plaintiff has to prove, or the defendant is permitted to controvert, is the amount of the damages, for the cause of action is admitted (*q*).

An instance of a case for a writ of inquiry would be if a defendant in a breach of promise case or in any action of tort could not deny the promise or the doing of the tort, but yet wished to be heard on the question of the amount of damages to be awarded. He might adopt the course of not appearing to the writ in the first instance, but letting the plaintiff sign interlocutory judgment in default of appearance, and then appearing on the assessment of damages.

Non-appearance in action to recover land.

Fourthly.—The writ may be for the recovery of land.

(*n*) Order XIII. r. 6. For different ways in which an action can be tried, see post, p. 88.

(*o*) 1 Wm. 4, c. 7, s. 1.

(*p*) See post, p. 89.

(*q*) Arch. Pr. 13th ed. pp. 810-813.

Here if the defendant does not appear within the eight days, or appearing limits his defence to part only of the land (*r*), the plaintiff on affidavit, as in the other cases, may sign judgment for the land or the part thereof to which the defence does not apply (*s*); and where the plaintiff has in addition indorsed a claim for mesne profits (*t*), arrears of rent, or damages for breach of contract, the plaintiff may as to them proceed as already pointed out in respect of money claims indorsed (*u*).

In some cases a defendant may, by oversight or from some other reason, have omitted to appear to a writ within the proper time, and the plaintiff may have accordingly signed judgment. Notwithstanding this, if he can shew a good defence on the merits he may, on applying to the Court or a Judge, be let in to defend, but it will usually be on the terms of his paying the costs of the judgment obtained against him by his default, and other terms may be imposed upon him, as he is only let in to defend by the leniency of the Court (*x*).

When a defendant who has not appeared is an infant or person of unsound mind not so found by inquisition, the plaintiff cannot sign judgment as in ordinary cases, but he may apply to the Court or a Judge that some proper person may be assigned guardian by whom such infant or person of unsound mind may defend the action. In support of such an application he must shew that the writ was duly served, and that after the time for appearance, and at least six days before the hearing, notice of such application was served upon or

(*r*) See ante, pp. 45, 46.

(*s*) Order XIII. r. 7.

(*t*) Mesne profits are intermediate profits; that is, profits which have been accruing between two given periods: Brown's Law Dictionary, 2nd ed. p. 343, tit. 'Mesne.'

(*u*) Order XIII. r. 8.

(*x*) Order XXIX. r. 14; and see Griffith and Loveland's Pr. p. 209

left at the dwelling-house of the person with whom or under whose care such defendant was at the time the writ was served; and also, if an infant, served upon or left at the dwelling-house of the father or guardian of such infant, unless at the hearing of the application this latter point is dispensed with (y).

Date of judgment by default.

A judgment by default is dated as of the day on which the requisite documents are left with the proper officer for the purpose of the entry of the judgment, and the judgment takes effect as from that date (z).

Appearance where no defence.

Defendants often appear to actions notwithstanding that they may not have any real defence, for the purpose of gaining time or for other reasons. Under the old practice this frequently worked great injustice to plaintiffs, for it was necessary to go on through all the pleadings and ultimately have the action tried before judgment could be obtained. This is so, and necessarily so, still in actions for unliquidated demands, for there at any rate the question of amount may be always in dispute; but a very important new practice in cases of liquidated demands is now allowed (a). This is by proceeding under Order XIV., by which it is provided that when a defendant appears to a writ of summons specially indorsed, the plaintiff may on affidavit verifying the cause of action, made either by himself or any other person who can swear positively thereto, call on the defendant to shew cause why the plaintiff should not be at liberty to sign final judgment for the amount indorsed on the writ with interest (if any) and costs. This application is made by summons returnable not less than two clear days after service, and a copy of the affidavit on which it issues must be served with it. On the return of the

Order XIV.

(y) Order XIII. r. 1.

(z) Order XII. r. 3.

(a) As to the former proceedings under the Bills of Exchange Act, 1855, see ante, pp. 46, 47.

summons the Court or a Judge may, unless satisfied that the defendant has a good defence to the action on the merits, or that under the circumstances the defendant ought to be allowed to defend, make an order empowering the plaintiff to sign final judgment accordingly notwithstanding the defendant's appearance. The plaintiff then, in pursuance of this order, signs judgment and taxes his costs. The ordinary and usual costs allowed in such a case on taxation will be found in the Appendix (b). If it appears that although there is a defence to part of the plaintiff's claim, to another part there is not, judgment may be forthwith given for the part to which there is no defence, and one defendant may be allowed to defend, while judgment may be given against another. Practically on an application under Order xiv., the Master may adopt one of three courses, viz., (1.) He may order judgment; (2.) He may refuse the application, giving to the defendant unconditional leave to defend; or (3.) He may give defendant leave to defend on terms of paying money into Court. It may be noticed that as a general rule the Masters do not receive affidavits in reply; they act simply on the plaintiff's affidavit filed in the first instance and the defendant's affidavit in opposition; they have, however, a discretion on the point (c).

This new practice is, as would be expected, very much used, and is of undoubted benefit.

(b) Post, p. 201.

(c) *Rotherham v. Priest*, 49 L. J. Q. B. 104. For observations and cases under Order xiv., see Griffith and Loveland's Pr. pp. 217-219.

CHAPTER III.

PROCEEDINGS FROM APPEARANCE TO THE CLOSE OF THE
PLEADINGS.

The object of
pleadings.

THE pleadings in an action consist of the statements of the plaintiff and defendant respectively, and have for their object the shewing the Court and jury the questions in issue between the parties and the facts on which they respectively rely.

General points
as to pleadings.

Before proceeding to consider these pleadings in detail it will be well to observe some points affecting them all generally. It has been before noticed (*d*) that under the practice prior to the Judicature Acts the pleadings were couched in technical language involving considerable repetition, and often on account of this running to considerable length, and these were points that could well be amended. Pleadings are now to be as brief as the nature of the case will admit of, and to state as concisely as may be the material facts on which the party pleading relies, but not the evidence by which they are to be proved; such statement being divided into paragraphs numbered consecutively, and each paragraph containing as nearly as may be a separate allegation, and dates, sums, and numbers are to be expressed in figures and not in words (*e*). They are to be printed unless containing less than ten folios (*f*), when they may be either written or printed, or partly

(*d*) Ante, p. 5.

(*e*) Order XIX. r. 4.

(*f*) Order XIX. r. 5a. A folio consists of seventy-two words, every figure being counted as a word (Order XIX. r. 5).

one and partly the other (*g*); and are served by being delivered at the address for service, or if no appearance has been entered they are delivered by being filed with the proper officer (*h*). In the Division the special practice of which is now being considered, the only case in which it would thus be necessary to file a pleading would be where the writ is issued for a fixed sum, and the writ is not specially indorsed, and the defendant does not appear (*i*). Service of pleadings, notices, summonses, orders, rules, or other proceedings in the course of an action must be effected before 6 p.m. and on Saturdays before 2 p.m., otherwise service will be deemed to have been effected on the following day, or in the case of Saturday on the following Monday (*k*). Pleadings must be marked on the face with the date when delivered, and the reference to the action (*l*), the Division to which, and the Judge (if any) (*m*) to whom assigned, the title of the action (*n*), the description of the pleading, and the name and place of business of the solicitor and agent (if any), or the name and address of the person delivering the same if acting in person (*o*); and in a pleading denying any allegation in a previous pleading it must not do so evasively, but must answer the point in substance, and generally a fair and substantial answer must be given (*p*). Every party in his pleading must specifically deny any allegation of fact appearing in his opponent's pleadings, or it is taken as admitted, except as against an infant, lunatic, or person of un-

(*g*) Order XIX. r. 5a.

(*h*) Ibid. r. 6.

(*i*) See ante, p. 49.

(*k*) Rule 43 of April, 1880.

(*l*) That is, the year when issued, the first letter of the plaintiff's name, and the number of the writ in the particular Division, thus—1878. H. No. 150.

(*m*) This would only be in the Chancery Division. In the Division the practice of which is now being considered the Judge is never named.

(*n*) That is, the names of the plaintiff and defendant, thus: Between A.B. plaintiff and C.D. defendant.

(*o*) Order XIX. r. 7.

(*p*) Ibid. r. 22.

sound mind not so found by inquisition; and each party must allege all such facts not appearing in the previous pleading as he means to rely on, or which if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings, *e.g.*, fraud, or the Statute of Limitations (*q*). When a contract is alleged in any pleading a bare denial of the contract by the opposite party is construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law whether with reference to the Statute of Frauds or otherwise (*r*).

Instances of
the shortening
of pleadings.

On the point that pleadings are to be stated as concisely as can be the following instances may be noticed. Where in any pleading it is necessary to allege malice, fraudulent intention, or other condition of the mind of any person, it is sufficient to simply allege the same as a fact without setting out the circumstances from which the same is to be inferred (*s*). When it is material to allege notice it is sufficient to simply allege it as a fact unless the form or precise terms of such notice are material (*t*). When any contract is to be implied from a series of letters or conversations it is enough to allege such contract as a fact, and refer to such conversations or letters without setting them out in detail (*u*). No person need state in his pleading a fact presumed by the law in his favour, or as to which the burden of proof lies on the other side, unless the same has first been specifically denied; *e.g.*, consideration for a bill of exchange where the plaintiff sues only on

(*q*) Where, however, a pleading on its face shews the party to be barred by the Statute of Limitations, his opponent may demur to such pleading. There is here a distinction between the Statute of Limitations and the Statute of Frauds. The latter must be pleaded. The title to the estate, not the mere right to proceed for its recovery, is affected by the former. (*Dawkins v. Penrhyn*, 4 App. Cas. 51).

(*r*) Order XIX. rr. 17-20, 22, 23.

(*s*) Ibid. r. 25.

(*t*) Ibid. r. 26.

(*u*) Ibid. r. 27.

the bill, and not for the consideration as a substantive ground of claim (*v*).

The first pleading in an action is the statement of claim by the plaintiff. Unless the defendant at the time of appearance states that he does not require a statement of claim—as he may do—the plaintiff must deliver one within six weeks from the time of the defendant entering his appearance. Even although the defendant has stated that he does not require a statement of claim, the plaintiff may deliver one if he like within the six weeks, but he is liable to have to pay the costs of it, even although he succeed in the action, if its delivery seems to have been unnecessary. After the six weeks no statement of claim can be delivered unless ordered by the Court or a Judge, or by consent (*w*). In the case of a specially indorsed writ the plaintiff may if he think fit deliver as his statement of claim a notice to the effect that his claim is what appears in the indorsement of the writ, unless he is ordered to deliver a further statement (*x*). The plaintiff in his statement of claim may specify where the action is to be tried, and if he does not state any place the trial is to be in Middlesex—that is, at Westminster (*y*). Statement of claim.
Notice in lieu of statement of claim.

The consequence of the statement of claim not being delivered within the proper time is that it is open to the defendant to apply to dismiss the action for want of prosecution (*z*). On such an application, however, it is usual, at the request of the plaintiff, to give him a limited further time to deliver his statement of claim, he paying the costs of the application to dismiss. Consequence of statement of claim not being delivered within proper time.

The next pleading is the statement of defence by the defendant, which must be delivered within eight days Statement of defence.

(*v*) Order XIX. r. 28.

(*w*) Order XXI. r. 1. Rule 42 of April 1880.

(*x*) Ibid. r. 4.

(*y*) Order XXXVI. r. 1. As to changing the place of trial, see post, p. 78.

(*z*) Order XXIX. r. 1.

from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last (a). Where in consequence of the defendant stating that he does not require any statement of claim none is delivered, the defendant may deliver a statement of defence within eight days after appearance (b), and where leave has been given to a defendant to defend under Order xiv. (c), notwithstanding there has not been any statement of claim delivered, he must deliver his statement of defence within eight days from the order giving him leave to defend, or within such other time as may be limited by the order (d). The order usually expressly provides that it be delivered within eight days after the delivery of the statement of claim.

Costs may be given.

Notwithstanding a defendant may succeed in an action, and thus get the general costs of it, if by his defence he has put the plaintiff to proof of facts which in the opinion of the Court or a Judge ought to have been admitted, the Court may make such order as to the extra costs occasioned thereby as shall be just (e). Care should therefore be taken not to put unnecessary points in issue by the statement of defence.

Set-off and counter-claim

If a person who is sued has himself some claim against the party suing him he may set this off by way of counter-claim, *even although sounding in damages*; and such set-off or counter-claim has the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim, but the Court or a Judge, if of opinion that such counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, may refuse to allow the defendant to avail himself thereof (f).

(a) Order xxii. r. 1.

(b) Ibid. r. 2.

(c) Ante, pp. 52, 53.

(d) Order xxii. r. 3.

(e) Ibid. 4.

(f) Order xix. r. 3.

The alteration in the former practice made by this rule is very great. Formerly a set-off could only be allowed if liquidated, or of such a nature as might be rendered liquidated without a verdict for the purpose; now a claim merely resting in damages may be allowed. Formerly also a set-off could only be allowed to the extent of the plaintiff's claim: now it may go beyond that, and the result of the action be a verdict for a balance for the defendant against the plaintiff. It has been held that in an action by joint plaintiffs a separate counter-claim against one may be set up (*g*).

Alteration in previous rule as to set-off.

No defence is now allowed to be pleaded in abatement (*h*), nor is any new assignment allowed (*i*). Everything that would formerly have been alleged by way of new assignment may now be introduced by amendment of the statement of claim (*k*). A plea in abatement, or dilatory plea, was one of some matter not material to the merits of the proceeding, but technically necessary or proper, *e.g.*, to the jurisdiction, or on account of the death of one of the parties, marriage of a female party, &c. (*l*). A new assignment was where from the very general terms of the declaration the defendant was led to apply his plea to a different matter from that which the plaintiff had in view (*m*).

No pleas in abatement, or new assignments.

If the defendant does not within the proper time put in his statement of defence, the next step by the plaintiff is to proceed on his default, and in the same way as we have seen that the plaintiff's course when the defendant does not appear to the writ differs

Consequences of defendant not delivering defence within eight days.

(*g*) Griffith and Loveland's Pr. pp. 254-256, where will be found given various extreme instances of set-off and counter-claim allowed since the Act.

(*h*) Order XIX. r. 13.

(*i*) Ibid. r. 14.

(*k*) Ibid. r. 14.

(*l*) Brown's Law Dict. 2nd ed. p. 3, tit. 'Abatement, Pleas in.'

(*m*) Ibid. p. 363, tit. 'New Assignment.'

according to the nature of the writ (*n*), so also here the course differs according to what the plaintiff is suing for.

Where action
for a liquidated
demand.

Firstly. If the plaintiff's claim is only for a debt or liquidated demand, and the defence is not delivered within the eight days, the plaintiff may at once sign final judgment and issue execution against him, or if there are several defendants against any one of them making default (o).

Where action
for an un-
liquidated
demand.

Secondly. If the action is for damages or detention of goods, interlocutory judgment may be signed and a writ of inquiry issued (p), and if there are several defendants, and only one makes default, interlocutory judgment may be signed as to that one, and the action proceeded with against the others; no separate writ of inquiry being issued, but the damages as to all being assessed at the trial (q).

Where action
partly for a
liquidated
amount and
partly not.

Thirdly. If the action is partly for a debt or liquidated demand, and partly for damages or detention of goods, then as to each part the plaintiff may proceed as above stated (r).

When action
for recovery of
land.

Fourthly. If the action is for recovery of land the plaintiff may sign judgment to recover possession (s).

When the plaintiff signs final judgment in any of the above cases, it is signed first with the costs in blank; they are then taxed and filled in the judgment by a Master.

Reply.

The next pleading is the reply by the plaintiff,

(n) Ante, pp. 48-51.

(o) Order XXIX. r. 2.

(p) As to a Writ of Inquiry, see ante, p. 50.

(q) Order XXIX. rr. 4, 5.

(r) Ibid. r. 6.

(s) Ibid. r. 7.

which must be delivered within three weeks after the statement of defence, or if there are several defendants then within that time after the last of the statements of defence shall have been delivered (*t*). This is most usually merely a joinder of issue, that is, a traverse or denial and putting in issue of the facts alleged by the defendant in his defence, and if this is so here the pleadings terminate. No pleading subsequent to the reply is allowed, except a joinder of issue, without leave of the Court or a Judge, and then upon such terms as the Court or a Judge shall think fit (*u*). Such subsequent pleading is styled a rejoinder.

A case in which joinder of issue is usually necessary after reply is where the defendant's statement of defence contains also a counter-claim, for this being in effect equivalent to a statement of claim in a cross-action, the plaintiff's reply is equivalent to his statement of defence therein, and the subsequent joinder of issue by the defendant to his reply. It is not often that any pleading beyond this can be required. Any pleading subsequent to reply must be delivered within four days after the delivery of the previous pleading unless otherwise ordered (*x*).

As soon as either party has simply joined issue upon any pleading of the opposite party without adding any further or other pleading thereto, the pleadings as between such parties are deemed to be closed (*y*), and their object being attained the cause is ready to go to trial; but if it is made to appear to a Judge that the pleadings do not sufficiently define the issues of fact in dispute between the parties, he may direct them to prepare issues to be tried, to be settled by a Judge if they differ on them (*z*).

(*t*) Order xxiv. r. 1.

(*u*) Ibid. r. 2.

(*x*) Ibid. r. 3.

(*y*) Order xxv.

(*z*) Order xxvi.

Demurrer.

A demurrer is often had recourse to during the pleadings. It is the formal mode of disputing the sufficiency in law of the pleading of the other side (*a*), occurring when the plaintiff or defendant, as the case may be, admits, for the sake of argument, that what is stated in his opponent's pleading is true, but denies that it gives him any good ground of action or defence. Any party may demur (*b*), and the demurrer must state specifically whether it is to the whole or a part, and if so, to what part of the pleading of the opposite party, and must state some ground in law for the demurrer, although on argument the party may go beyond such ground (*c*). When a party desires to demur to part of a pleading and defend as to part, the two may be combined in one pleading (*d*). A demurrer not so combined in another pleading is delivered in the same manner and within the same time as the pleading would be which it stands in the place of (*e*).

Time for demurring.

Demurring and pleading together by leave.

If the party demurring desires to be at liberty to plead as well as to demur to the matter demurred to, he must, before demurring, apply to the Court or a Judge for an order giving him liberty to do so, and the Court or a Judge, if satisfied that there is reasonable ground for the demurrer, may make an order accordingly, or may reserve leave to him to plead after the demurrer is overruled, or may make such other order and upon such terms as may be just (*f*).

How demurrer disposed of.

When a demurrer is delivered either party may enter it for argument immediately and give notice thereof to the other party. If the party whose pleading is demurred to disputes the demurrer and considers his

(*a*) Brown's Law Dict. p. 169, tit. 'Demurrer.'

(*b*) Order XXVIII. r. 1.

(*c*) Ibid. r. 2.

(*d*) Ibid. r. 4.

(*e*) Ibid. r. 3. See Griffith and Loveland's Pr. p. 292.

(*f*) Ibid. r. 5.

pleading good as it stands, no joinder in demurrer is requisite, but he should enter the demurrer for argument within ten days, and on the same day on which he enters it, give notice thereof to the other party, otherwise it will be held sufficient (*g*); if, however, he considers he can improve his pleading he should proceed to amend it by leave, which leave will only be granted on payment of the costs of the demurrer, and whilst a demurrer is pending no pleading can be amended except by leave (*h*). Whenever a demurrer is allowed upon argument, the party whose pleading is demurred to pays the costs of the demurrer (*i*); and if the demurrer was to the entire statement of claim, the costs of the action also, unless otherwise ordered (*k*). When a demurrer is overruled on argument the demurring party pays the costs of it unless otherwise ordered (*l*). When a demurrer is argued and allowed, ^{Amendment after demurrer.} or overruled, as the case may be, the Court has power to allow the party defeated on it to amend his pleading, or to raise by pleading any case he may be desirous of setting up in opposition to the matter demurred to (*m*).

When the demurrer is entered for argument, the ^{Demurrer} party who enters it must make up and deliver to the ^{book.} proper officer the demurrer book—that is a set of the pleadings or of those parts to which the demurrer relates, and this must be done four clear days at least before the day appointed for argument. In addition, ^{Points.} it is usual for each party, for the convenience of the Court, to draw out and exchange a statement of points to be argued on the demurrer (*n*).

The following would be an instance of a demurr- ^{Instance of a demurrable pleading.}

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- (*g*) Order XXVIII. r. 6.
 - (*h*) Ibid. r. 7.
 - (*i*) Ibid. r. 8.
 - (*k*) Ibid. r. 9.
 - (*l*) Ibid. r. 11.
 - (*m*) Ibid. rr. 9, 12.
 - (*n*) Arch. Pr. 13th ed. 745, 746.

able pleading. An indorsee for value of a bill of exchange sues the acceptor, who simply sets up in his defence that he received no value. This, though it would be a good defence in an action brought against him by the drawer, is no defence to the action of the indorsee. The plaintiff can therefore demur to the defence. A form of a demurrer is given in the Appendix (o).

Defences
arising
pending the
action.

Most defences have existed before action brought; but sometimes a defence may arise only after it has been commenced, *e.g.*, where after it is brought the defendant gets his discharge in bankruptcy. Such a defence, although it did not exist when the action was brought, may be set up either by the defendant, or by the plaintiff to a counter-claim, but if it arises on the defendant's part after statement of defence has been delivered, or after the expiration of the time for delivering the statement of defence, or if it arises on the plaintiff's part after reply has been delivered, it can only be set up within eight days of its having arisen, and by leave of the Court or a Judge (p). Where a defendant has set up any defence that has arisen pending the action, the plaintiff may at once confess it, and—as it did not exist when he brought his action—may sign judgment for his costs up to the time of pleading it (q). This practice is similar to the former plea of *puis darrein continuance*.

Amendment of
pleadings.

Very full powers of amendment of pleadings exist. The Court or a Judge has power at any stage of the proceedings to allow either party to amend his statement of claim, or defence, or reply, or may order to be struck out or amended any matter in such statements respec-

(o) Post, p. 197.

(p) Order xx. rr. 1, 2.

(q) Ibid. r. 3.

tively which may be scandalous, or may tend to pre-
 judice, embarrass, or delay the fair trial of the action,
 and all such amendments may be made as may be
 necessary for the purpose of determining the real
 questions or question in controversy between the
 parties (r). Embarrassing
or scandalous
matter.

With regard to scandalous or embarrassing matter,
 it has been recently held that every fact of which
 evidence may be given at the trial is material and may
 be pleaded, so that where in an action for breach of
 promise of marriage the statement of claim alleged that
 the defendant had seduced the plaintiff and had in-
 fected her with a venereal disorder, it was decided that
 such an allegation was a proper one and could not be
 struck out (s).

With regard to amendment by a party of his own
 pleading, this can in some cases be done without leave,
 viz. :— When amend-
ments may be
made
without leave.

1. A plaintiff may once at any time before the
 expiration of his time to reply, or where no defence
 has been delivered within four weeks from the appear-
 ance of the defendant who last appeared, amend his
 statement of claim without any leave (t).

2. A defendant, also, *who has set up in his defence
 any set-off or counter-claim* may any time before the
 expiration of the time allowed him for pleading to the
 reply, and before pleading thereto, or in case there is
 no reply, then at any time before the expiration of
 twenty-eight days from the filing of his defence, *amend
 such set-off or counter-claim* without any leave (u).
 Such amendment, however, made without leave, may on

(r) Order XXVII. r. 1. For instances of amendments allowed under this
 rule, see Griffith and Loveland's Pr. pp. 283-286. See also a provision for
 amendment at any time of any proceedings in Rule 44 of April, 1880.

(s) *Millington v. Loring*, 29 W. R. 207.

(t) Order XXVII. r. 2.

(u) *Ibid.*, r. 3. It will be observed that this only applies to amendment
 of the set-off or counter-claim, and not to the defence itself.

application within eight days of delivery be disallowed if the Court or a Judge considers proper to so disallow it (x).

Time to amend under order. When an order for leave to amend is made the pleading must be amended within the time named in the order, or if no time is named, then within fourteen days from the date of the order, otherwise it becomes *ipso facto* void, unless the time is extended (y).

How amendments made. Every amended pleading must be marked with the date of the order (if any) under which it is amended, and also with the day on which the amendment is made, and be delivered to the opposite party within the time allowed for amending (z). If the amendments do not exceed two ordinary folios (℥) in any one place, they may be made in writing, unless it would render the pleading difficult or inconvenient to read, in which case, or if they exceed the before-mentioned length, the pleading must be reprinted (b).

Effect of amending statement of claim when defence already delivered. Where a plaintiff, after the delivery of a statement of defence, has amended his statement of claim, the defendant need not deliver a new defence or amend his original defence unless he so desire. If he does not, the action will proceed to trial on his original defence, and if this is the case the amendments will of course stand as admitted as far as they go (c).

Between the appearance and the close of the pleadings in every action various interlocutory applications of more or less importance are invariably made, and other interlocutory steps may be taken. Before, there-

(x) Order XXVII. r. 4.

(y) Ibid. r. 7.

(z) Ibid. rr. 9, 10.

(a) That is seventy-two words to each folio, every figure counting as a separate word.

(b) Order XXVII. r. 8.

(c) *Boddy v. Wall*, L. R. 7. Ch. D. 164; *Darling v. Lawrence*, 46 L. J. Ch. 808.

fore, proceeding further with the direct course of an ordinary action it is necessary to devote some attention to them.

In the Appendix the student will find a complete set of ordinary and simple pleadings in an imaginary action (*d*).

It may be here noticed that any party may at any stage of the action apply to the Court or a Judge for such order as he may upon any admissions of fact in the pleadings be entitled to without waiting for the determination of any other question (*e*).

In an action for recovery of land the rules as to pleadings are not quite the same as in other actions, it being provided that a defendant in any such action in possession by himself or his tenant need not plead his title unless his defence is of an equitable nature, but, except in such case, it is sufficient for the defendant to state that he is so in possession, and he may then rely upon any ground of defence he can prove (*f*). In a very recent case the plaintiff in his statement of claim stated his title, and the defendant simply alleged in his statement of defence that he was in possession, and the plaintiff contended therefore that his title was admitted. The Court of Appeal held that this was not so, and that the plaintiff must prove his title (*g*).

(*d*) Post, pp. 196, 197.

(*e*) Order XL. r. 11.

(*f*) Order XIX. r. 15.

(*g*) *Danford v. McAnulty*, W. N., 19 Mar. 1881, p. 43. L. J. Notes of Cases, 19 Mar. 1881, p. 34.

CHAPTER IV.

INTERLOCUTORY PROCEEDINGS.

	INTERLOCUTORY applications are sometimes made to the Court, sometimes to a Judge or Master in Chambers.
Summons and order.	When the application is made in Chambers, it is done by means of a summons, on which an order is made.
Motion and rules nisi and absolute.	When the application is made to the Court, it is done by means of a motion, on which, in the first instance, usually a rule <i>nisi</i> is granted, which may afterwards be made a rule absolute. That is to say, that a first application is made <i>ex parte</i> , and if a <i>primâ facie</i> reason is shewn for granting what is asked, an order is made for it, unless by a certain day cause is shewn against it by the other side. This is a rule <i>nisi</i> which is served on the other side, and if no cause is shewn against it, or if, on argument, the Court is still of opinion that what is asked for should be granted, it is then made absolute ; if not it is discharged.
Notice of motion.	With regard to motions it is provided (<i>h</i>) that except where under the former practice a rule has been made <i>ex parte</i> absolute in the first instance, and except where otherwise provided, unless it is only a rule <i>nisi</i> , no motion shall be made without previous notice to the parties affected thereby. But the Court or a Judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make an order <i>ex parte</i> upon such terms as to costs or otherwise and subject to such undertaking, if any, as the Court or Judge may

(*h*) Order LIII. r. 3.

think just ; and any party affected by such order may move to set it aside. Two clear days' notice of motion must be given (*i*).

A rule *nisi* only stays proceedings in the action when it contains a direction to that effect. Any such rule against which cause has to be shewn may be enlarged by the Court on the application of either party (*j*). When a rule nisi stays proceedings.

Any person desirous of shewing cause against a rule *nisi* must obtain an office copy of the rule and of the affidavits upon which it was granted. Affidavits may then be filed against the rule, and the Court has a discretion as to receiving further affidavits in reply to these (*k*). Shewing cause against rule nisi.

Some rules of a simple nature may be granted without any actual motion to the Court, and they are called 'side-bar' rules, *e.g.*, a rule to a sheriff to return a writ, or to make a submission to arbitration a rule of Court. In such cases a brief is indorsed and delivered to counsel (who is paid a fee of 10s. 6d.), and he signs it, and the rule is then drawn up (*l*). Side-bar rules.

The practice observed now in the hearing of summonses in this Division is to place them in a list returnable at certain fixed hours. At the time named the list is called over and the summonses are heard, but if on the first calling one of the parties is not present, it is, when the list is gone through again, called a second time, and the other party is then entitled to attend the summons *ex parte* on an affidavit of service; and if neither party is present at the second calling, the summons is struck out of the list. Summonses for time are always made returnable at 10.30 and heard Procedure on summons.

(*i*) Order LIII. r. 4.

(*j*) Arch. Pr. 13th ed. 1260, 1261.

(*k*) Ibid. 1262, 1263.

(*l*) Ibid. 1268.

in priority to other summonses, and are not placed in any list (*m*).

Summons for time.

A very frequent application is for an extension of the times allowed for taking the different steps in an action or for filing answer to interrogatories, affidavit of discovery, or the like, and such extension may be granted even after the expiration of the time appointed or allowed (*n*). When time is, however, required to deliver any pleading the proper course now is to apply to the other side in the first instance for a consent to the required extension (*o*). If this application is not made the extra cost of the summons for time is not usually allowed, and if the party applied to improperly refuses to consent he is sometimes ordered to pay the extra cost of the summons.

Consent for time.

One application for time always granted.

Granting time on terms.

As a matter of practice it is a rule to always grant one application for time to deliver a pleading, but for any further time some special reason must be shewn, and then the party applying usually has to pay the costs of the application. The Court also, in granting any extension, is not granting anything that the party is entitled to as a right, but is granting a favour, and therefore can always, in giving the time, put the party under any terms; for instance, on granting a defendant time to deliver his statement of defence, it can do so on the terms that he should take short notice of trial instead of what he is entitled to (*p*), or the best notice of trial that the plaintiff may be able to give, so as to enable him to have the cause tried without delay. Sometimes, too, the order for time is made "peremptory," that is on the condition that the party shall not apply for time again.

(*m*) Rules 33-40 of April, 1880. This practically makes the procedure on summons somewhat as it is and has been in the Chancery Division, as to which see post, p. 142.

(*n*) Order LVII.

(*o*) Rule 42 of April, 1880.

(*p*) Post, p. 89.

Payment of money into Court in an action is a step ^{Payment into Court.} that very frequently occurs. An action may be brought against a defendant on a cause of action on which he admits a liability, but not to the extent claimed by the plaintiff; here to go on and contest the question of amount only would certainly entail on the defendant the costs of the action, for the plaintiff would recover something, but if he pays a sum into Court the plaintiff will, if he goes on, be going on at his own risk as to costs if he do not recover more than paid in.

Under the former practice, except in a few cases (*q*), ^{Former practice hereon.} money could only be paid into Court when the action was for a debt or liquidated demand, and then only with the plea. This payment into Court with the plea was all that could be desired if the defendant had made a tender before the action, because he could then plead the tender and pay the same amount into Court, and if the plaintiff did not recover more the defendant got the whole costs of the action; but where there was no tender before action, as no tender can be made after action, the defendant had at any rate to pay the costs down to the plea and payment into Court. This was, however, obviated thus:—the defendant would take out a summons to stay the action on payment of the sum he admitted, and if this was not acceded to by the plaintiff, it operated practically as a tender from that time, so as to throw the costs of the action on the plaintiff from then if he did not recover more. This course is not now necessary, and indeed is no longer allowed (*r*).

Under the present practice a defendant is at liberty ^{New practice hereon.} in any action to recover a debt or damages, to pay money into Court at any time after service of the writ, and before or at the time of delivering his defence, or

(*q*) An instance was under 6 & 7 Vict. c. 96. See Indermaur's Principles of Com. Law, 2nd ed. 319, 320.

(*r*) See Griffith and Loveland's Pr. p. 303.

by leave of the Court or a Judge at any later time. This payment into Court is pleaded in the defence, and the claim or cause of action in respect of which it is made is specified therein (*s*). Where, however, a plaintiff claims for distinct pieces of work and labour alleged in separate paragraphs of the statement of claim, a defendant need not in paying money into Court specify in his defence how much is paid in in respect of each head of claim (*t*). If the money is paid into Court at the time of delivering the defence, the fact of payment in appears thereon, and the official receipt is in practice written in the margin of the statement of defence which is delivered, but if it is paid in before, the defendant thereupon serves upon the plaintiff a notice that he has paid in such money, and in respect of what claim (*u*).

Course by
plaintiff on
payment into
Court.

The plaintiff, on payment into Court of money, may at once obtain it out, the money being paid to him personally or on his written authority to his solicitor, for the verification of which authority no affidavit is necessary unless specially required by the officer of the Court (*x*). The plaintiff then simply continues his action for the balance if not satisfied with the amount paid in; but if he is satisfied with it then he may within four days after receipt of notice of payment in, or if payment in is first stated in the defence, then before reply, give notice to the defendant that he accepts it in satisfaction of the causes of action in respect of which it is paid in. He then taxes his costs, and if they are not paid within forty-eight hours signs judgment for them (*y*). Taking of money out of Court is no waiver of objection to the defence, nor

(*s*) Order xxx. r. 1.

(*t*) *Paraire v. Loibl*, 49 L.J. (Ex.) 481.

(*u*) Order xxx. r. 2.

(*x*) *Ibid.* r. 3.

(*y*) *Ibid.* r. 4.

is it any evidence against the plaintiff on other parts of his case (z).

Discovery and inspection of documents are very important interlocutory proceedings. Either plaintiff or defendant in the course of an action may find it necessary or advisable to obtain information as to certain facts from his opponent, or to know what documents he has in his possession relating to the matters in question in the action, and to inspect the same (a). Discovery, inspection, &c.

The first of these objects, viz., discovery of facts, is attained by means of interrogatories, which are certain written questions administered to the other party to the action, and required to be answered by him upon oath. These interrogatories may be delivered by the plaintiff with his statement of claim (b), or by the defendant with his statement of defence, or by either of them at any subsequent period before the close of the pleadings, without any order for that purpose, and they may also be administered at any time by leave of the Court or a Judge (c). If the defendant is a body corporate or joint stock company, the plaintiff may apply in Chambers for leave to administer interrogatories to any member or officer (d). The costs of improper or unnecessarily lengthy interrogatories may be disallowed by the Court or a Judge, or by a taxing master (e). Interrogatories
Time for
interrogatories
to be administered.

Interrogatories
where defendant a body
corporate or company.

If a party objects to answer any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the action, or that the matters inquired into are not Objections to Interrogatories.

(z) Griffith and Loveland's Pr. p. 304.

(a) For information on the subject of discovery and inspection prior to Jud. Acts, see Griffith and Loveland's Pr. pp. 306-337.

(b) However in practice interrogatories are not allowed by a plaintiff before statement of defence put in, as the information given in the defence may often render the interrogatories unnecessary, see Griffith and Loveland's Pr. p. 337.

(c) Order XXXI. r. 1.

(d) Ibid. r. 4.

(e) Ibid. r. 2.

sufficiently material at that stage of the action, or on any other ground, he may take that objection in the affidavit in answer (*f*). The same rule which contains this provision also goes on to provide that an application to set aside the interrogatories on the ground that they have been exhibited unreasonably or vexatiously, or to strike out any interrogatory or interrogatories on the ground that it or they is or are scandalous, may be made at Chambers within four days after service of the interrogatories (*g*). This rule is not framed with that clearness which might be desired, and it has been decided under it that a party cannot now apply before he has put in his affidavit in answer to have the whole set of interrogatories struck out on the ground that some of them or parts of some of them are not such as he is bound to answer (*h*). It seems he may make the application before he answers, only when he objects to answer the whole of the interrogatories; if he only objects to some of them, then he must take the objection in his answer.

Answer to
interro-
gatories.

Interrogatories must be answered by affidavit to be filed within ten days, and if such affidavit exceeds ten folios it must be printed (*i*). If the party claims any privilege from answering any question (*k*) it, and the grounds of it, must be stated in the affidavit (*l*). If the party interrogated omits to answer within the proper time, or answers insufficiently, the proper course is to apply by summons in Chambers, requiring him to answer, or to answer further, as the case may be, or a *vivâ voce* examination may be ordered (*m*).

(*f*) Order xxxi. r. 5 of November, 1878.

(*g*) Ibid.

(*h*) *Gay v. Labouchere*, L. R. 4 Q. B. D. 206; 48 L. J. Q. B. 479.

(*i*) Order xxxi. rr. 6, 7, 7a.

(*k*) As to cases of privilege, see Indermaur's Principles of the Com. Law, 2nd ed. pp. 403-408.

(*l*) Order xxxi. r. 5 of November, 1878.

(*m*) Order xxxi. rr. 9, 10; Griffith and Loveland's Pr. p. 343. As to proceedings subsequently if order to answer not obeyed, see post, p. 76.

The answers to interrogatories are afterwards frequently used at the trial, and in such event any one of the answers may be used as evidence by itself, but if the Judge considers the answers all so connected that one ought not to be used without the other or others he may direct them all to be put in (o). Answers used at trial.

Discovery of documents may be obtained by either party to an action by applying by summons, without filing any affidavit in support thereof, asking for an order for his opponent to make an affidavit of the documents which are or have been in his possession or power relating to any matter in question in the action (p). A form of this affidavit of documents will be found in the Appendix, and for a clear understanding of the matter the reader is referred to it (q); and by reference to it, it will be seen that if the party claims that he is privileged from producing any documents either by reason of ordinary privilege or on the ground that the documents are not relevant to the case of the applicant, he must distinctly state it. It will not suffice to deny that it will tend to prove the case, nor will the Court be bound by an affidavit of want of relevancy, but if it see from the materials before it that the documents are relevant it will order an inspection; but except in such a case the denial on oath of the possession of the documents or of their relevancy is conclusive (r). Discovery of documents.

Inspection of documents is usually obtained in the following manner:—The party requiring inspection gives to his opponent a notice in writing to produce to him any document mentioned in a pleading or affidavit of his (s). The other party on receipt of this notice should within two days, if the documents are all specified Inspection of documents.

(o) Order xxxi. r. 23.

(p) Ibid. r. 2.

(q) Post, p. 198.

(r) Griffith and Loveland's Pr. p. 329.

(s) See Form given in Appendix, post, p. 199.

in his affidavit of documents mentioned in the last paragraph, or within four days if not so specified, deliver a notice stating a time within three days at which the documents may be inspected at his solicitor's office (*t*). If the notice to produce for inspection is not complied with in this way, the party not complying will be prevented from giving such document in evidence, unless he shews the Court that he had sufficient cause for not complying therewith (*u*). In addition to this an application may be made by summons asking for an order for inspection (*w*); and if in any case documents of which inspection is sought do not appear in any pleading or affidavit of the party, the only course is to apply direct for an order for inspection, but in this case the application must be supported by an affidavit by some person shewing (1) of what documents inspection is sought; (2) that the party applying is entitled to inspect; and (3) that they are in the possession or power of the other party (*x*).

Consequences
of disobedience
to order for
discovery, &c.

Service of
order for dis-
covery.

The consequence of a person failing to obey any order to answer interrogatories, or for discovery or inspection, is that he is liable to attachment, and also, if a plaintiff, to have his action dismissed for want of prosecution, and if a defendant, to have his defence struck out and to be placed in the same position as if he had not defended (*y*). To ground an application for attachment under this rule the service of the order need not be personal, as is necessary to ground an application for attachment in other cases, but service on the party's solicitor is sufficient, unless the party against whom the application is made can shew that he has had no notice or knowledge of the order, and in

(*t*) See Form given in Appendix, post, p. 199.

(*u*) Order XXXI. rr. 14, 16.

(*w*) Ibid. r. 17.

(*x*) Ibid. rr. 11, 18.

(*y*) Ibid. r. 20.

this case the solicitor himself is liable to attachment unless he has reasonable excuse (z).

An application that is not unfrequently made in the course of an action is for the plaintiff to be ordered to give further and better particulars of his claim; thus, if the plaintiff is suing on a contract containing a series of items, which necessarily cannot all appear in his statement of claim in detail, the defendant may by such an application obtain a detailed statement of account; or again, if the plaintiff is suing for injuries committed, particulars of and relating to them may be obtained in this way. Thus, for instance, if the plaintiff is suing an Omnibus Company for injuries done to him by the negligent driving of one of the defendants' drivers, particulars may be obtained of the time and place of the accident and of the injuries complained of, and of the expenses and other damage caused the plaintiff.

When an action consists entirely or mainly of matters of account, a very proper application is for it to be referred to one of the Masters, on the ground that it cannot be conveniently gone into at the trial (a). If this application is not made, as it should be if the action is really a matter of account, it may be referred by the Judge at the trial. In addition to this, under the provisions of the Judicature Act, 1873 (b), there are wide powers conferred of referring matters to an official or special referee, and this without consent in any matters requiring prolonged examination of documents or accounts, or any scientific or local investigation.

If an action is brought for a sum on contract not exceeding £50, a defendant may, within eight days from the service of the writ, apply for an order referring the case to the County Court in which the action

(z) Order xxxi. rr. 31, 32.

(a) 17 & 18 Vict. c. 125, s. 3; Arch. Pr. 13th ed. p. 1378. See post, ch. vi. on 'Arbitration.'

(b) Sects. 56, 57.

Ordering trial
County
Court.

might have been commenced, and if the plaintiff does not shew good cause to the contrary the order will be made and the case tried in the County Court (*c*). In addition, where any action of contract is brought for a sum not exceeding £50, or, though originally exceeding that sum is reduced by payment, admitted set-off, or otherwise, to a sum not exceeding £50, a Judge of the High Court, on the application of either party *after issue joined*, may in his discretion and on such terms as he shall think fit order that the cause be tried in any County Court which he shall name. In this case, after trial the Registrar of the County Court certifies the result to the High Court and judgment in accordance with such certificate is signed in the High Court (*d*).

Immons to
change place
trial.

It has been stated that the plaintiff in his statement of claim mentions the place where he proposes that the action should be tried, and in default of his stating any place the trial will be in Middlesex (*e*). An application may always be made to change the place of trial; if made on the part of the plaintiff it will usually be granted on his paying the costs of the application, unless the defendant shews some good ground against changing it, for with him rested the right of choice in the first instance; but the application is more usually made on the part of the defendant, and in support of his application he must shew either that to change it in the way he proposes would be more convenient and a saving of expense, or that by reason of local prejudice or otherwise he cannot obtain a fair trial in the place where it is proposed that the trial take place (*f*).

(*c*) 30 & 31 Vict. c. 142, s. 7; Jud. Act, 1873, s. 67. As to the jurisdiction of County Courts, see post, p. 109, 110, 159.

(*d*) 19 & 20 Vict. c. 108, s. 26; see as to actions being removed from County Courts, post, p. 107.

(*e*) Ante, p. 57.

(*f*) See Order XXXVI. r. 1. It may be well to notice here the change in the practice as to the place of trial of an action. The rule was, that if the action was a local one, such as an action for trespass to land, the place of trial to be named by the plaintiff, called the venue, must be where the cause of action arose; but if the action was transitory, such as an action for debt, the plaintiff might lay the venue where he chose. The venue

When a plaintiff does not take some step in an action within the proper time appointed for that purpose a summons may frequently be taken out by the defendant asking that his action may be dismissed for want of prosecution. The chief cases in which such an application can be made are:—(1.) Where the plaintiff does not within the time allowed deliver his statement of claim (*g*); (2.) Where he omits to obey an order to answer interrogatories or for discovery of documents (*h*); (3.) Where he omits to give notice of trial within the proper time (*i*).

A summons to arrest a defendant in the course of an action—or as it is called to hold a defendant to bail—is an application sometimes though not very often made. By the Debtors Act, 1869 (*k*), it is provided that where the plaintiff proves at any time before final judgment by evidence on oath to the satisfaction of a judge (1) that he has good cause of action against the defendant to the amount of £50 or upwards; (2) that there is probable cause for believing that the defendant is about to quit England unless he is apprehended; and (3) that the absence of the defendant from England will materially prejudice him (the plaintiff) in the prosecution of his action, the Judge may order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court. Where the action is for a penalty or sum in the nature of a penalty other than a penalty in respect of any contract, it is not, however,

was, however, liable to be changed on grounds the same as may now be shewn to change the place of trial. By the rule quoted in this note the whole law of venue is abolished and the practice stands as stated in the text.

(*g*) Order xxix. r. 1.

(*h*) Order xxxi. r. 20.

(*i*) Order xxxvi. r. 4*a*.

(*k*) 32 & 33 Vict. c. 62. As to the arrest of absconding debtors in bankruptcy, see 33 & 34 Vict. c. 76.

necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England), is to be to the effect that any sum recovered against the defendant in the action shall be paid or that the defendant shall be rendered to prison (*l*).

Removal of an
action from
district
registry.

When an action has been commenced in a district registry (*m*), either party may at any time take out a summons for it to be removed to London, and the Judge may in his discretion make an order removing it (*n*). In the following cases also a defendant may remove such an action as a matter of right, viz.: (1.) Where the writ is specially indorsed and the plaintiff has not within four days after appearance given notice of an application under Order xiv. (*o*), the defendant may so remove it after the expiration of such four days and before delivering a defence and before the expiration of his time for doing so; (2.) Where the plaintiff has made an application under Order xiv. and failed, the defendant may so remove it after the order giving him leave to defend, and before delivering a defence, and before the expiration of his time for doing so; and (3.) Where the writ is not specially indorsed the defendant may so remove it after appearance and before delivering his defence and before the expiration of his time for doing so (*p*). When an action may be so removed of right the removal is effected by the defendant or his solicitor serving upon the other parties to the action and delivering to the district registrar a notice signed by himself or his solicitor to

(*l*) Compare this with the subject of the writ of *ne exeat regno*, and the case of *Drover v. Beyer*, subsequently dealt with, p. 150.

(*m*) As to which see ante, pp. 17, 18.

(*n*) Jud. Act, 1873, s. 65. Order xxxv. r. 13.

(*o*) As to which see ante, pp. 52, 53.

(*p*) Order xxxv. r. 11.

the effect that he desires the action to be removed to London, and the action is removed accordingly. If, however, the defendant giving such notice is merely a formal defendant, or has no substantial cause to interfere in the action, the Court or a Judge may order the action to proceed in the district registry notwithstanding such notice (q).

A summons is often taken out in the course of an action asking that the plaintiff may be ordered to give security for costs. Such an application must be made before issue joined, and the defendant does not waive his right to have the security by taking any step in the action, as by obtaining an order for time to deliver his defence or the like with knowledge of the ground for it, provided he apply before issue joined. The mere fact that the plaintiff is a pauper is no ground for getting security: and the following are the chief cases in which the order for security will be made (r):—

(1.) Where the plaintiff is permanently resident abroad, out of the jurisdiction of the Court (s). If, however, there are several plaintiffs, and one of them is resident here though the other may be abroad, security will not generally be ordered. A mere temporary absence is not sufficient, nor is an involuntary absence, as in the case of persons engaged abroad in the public service. The order for security will be made even although the plaintiff is a king of a foreign state (t); but it will usually be an answer to the application to shew that the plaintiff is in possession of property within the jurisdiction of a permanent nature, such as land, available to process by the defendant, but it will not be

(q) Order xxxv. r. 12.

(r) See hereon Arch. Pr. 13th ed. pp. 1139–1145.

(s) Prior to 31 & 32 Vict. c. 54, s. 5, the order for security would have been made against a plaintiff resident in Scotland or Ireland, but not so now, as by that Act provision is made enabling a person obtaining a judgment to register it in Scotland or Ireland and levy on it there.

(t) *Otho, King of Greece v. Wright*, 6 Dowl. 12; *Emperor of Brazil v. Robinson*, 5 Dowl. 522.

sufficient to shew that the plaintiff is in possession of money or Exchequer bills or other floating capital in this country (*u*). Where the defendant is *quasi* a plaintiff, as in replevin (*x*), and he resides abroad, he may be compelled to find security for costs. He may also be compelled to do so in a feigned issue under the Interpleader Act (*y*), but in other actions the defendant will not be compelled to give such security (*z*).

(2.) In any action of tort, on an affidavit that the plaintiff has no visible means of paying his (the defendant's) costs in the action if he fail, the defendant may, unless the plaintiff can satisfy the Judge that he has a cause of action fit to be prosecuted in the High Court, obtain an order for him to give security for such costs or that it be referred to a County Court to be therein named; and in the event of its being transferred to a County Court the costs of all parties in respect of the proceedings subsequent to the order are allowed according to the scale of costs in use in County Courts, and the costs of the proceedings in the High Court are allowed according to the scale in use there (*a*). This is naturally a very great protection to defendants in speculative actions of tort, enabling them to get the cause cheaply and quickly disposed of.

(3.) Trustees of a bankrupt plaintiff may be ordered to give security for costs when they interfere in an action commenced by the bankrupt and continue it for the benefit of his estate (*b*).

(4.) A plaintiff suing for a penalty under the Mer-

(*u*) *Edinburgh Ry. Co. v. Dawson*, 7 Dowl. 573.

(*x*) As to which see ante, p. 47, note (*g*).

(*y*) As to which see post, p. 83.

(*z*) Arch. Pr. 13th ed. p. 1141.

(*a*) 30 & 31 Vict. c. 142, s. 10.

(*b*) 15 & 16 Vict. c. 76, s. 142.

chandise Marks Act may be ordered to give security for costs (*c*).

(5.) A limited joint stock company will be ordered to give security for costs, if it can be shewn that if the defendant is successful the assets may be insufficient to pay his costs (*d*).

When security for costs is ordered it may be either a ^{How security} deposit of money in Court or a bond given to the party ^{given.} requiring the security (*e*).

The process of interpleader occurs where claims are ^{Interpleader.} made by two or more persons against another who claims no interest in the subject-matter of the dispute himself, and the object of the process is to have the point of who is entitled decided between the antagonistic claimants. The procedure and practice as to this remains as before (*f*), and applies to all actions in and all Divisions of the High Court (*g*).

The cases in which interpleader arises are two; viz. (1) where an action is actually brought against a person, and (2) where conflicting claims are made on a sheriff in possession. In the former case the defendant may apply for interpleader at any time after being served with a writ of summons and before delivering a defence (*h*). The application must be supported by an affidavit by the defendant or some other party shewing facts to bring the case within the statute, and particularly stating that the applicant does not collude with the third party; this affidavit is entitled

(*c*) 25 & 26 Vict. c. 88, s. 24.

(*d*) 25 & 26 Vict. c. 89, s. 69.

(*e*) Rule 41 of April, 1880.

(*f*) The statutes relating to interpleader are 1 & 2 Wm. 4, c. 58; 1 & 2 Vict. c. 45; and 23 & 24 Vict. c. 126, ss. 12-18.

(*g*) Order I. r. 2.

(*h*) Ibid. It would appear, however, that in the case of interpleader provided for by the Judicature Act, 1873, sect. 25, sub-sect. 6, that a party might interplead before action brought against him. (See *New Hamburg and Brazilian Railway Company*, W. N. 1875, p. 239.

in the action and should shew that the writ in the action has been served and that the defendant has not delivered his statement of defence (*i*). In the latter case, which is indeed much the more frequent in practice, the sheriff applies for interpleader as soon as the conflicting claim is made on him (*k*); thus, for instance, the sheriff in possession, under a writ of *fiery facias* (*l*), receives notice that the goods of which he has taken possession are claimed by some third party under a bill of sale. Here he should first inquire into the matter and then make the application, which must be supported by affidavit stating the facts, which in his case need not deny collusion with the claimant. The interpleader summons calls the parties before the Judge, and if neither withdraws he may then direct an issue to be tried of who is entitled to the goods, and he may, if he thinks fit, direct a sale of the goods and payment into Court, or otherwise, of the amount, or where only matter of law is in dispute the Judge may decide the question or direct a special case to be stated for the opinion of the Court; or where the amount in dispute or the value of the goods is but small, he may decide the matter summarily (*m*).

Jurisdiction
of the Masters
in Inter-
pleader.

The Masters have all the authority and jurisdiction of a Judge at Chambers in interpleader cases, except where all parties concerned consent to a final determination of the question in dispute without a jury or special case, and except when the sum in dispute is less than £50 and one of the parties desires such a determination. In such cases the question must be determined by the Judge unless the parties agree to refer it to the Master (*n*).

(*i*) Arch. Pr. 13th ed. 1120.

(*k*) 1 & 2 Wm. 4, c. 58, s. 6.

(*l*) As to which see post, p. 101. See the enactments as to interpleader set out in Griffith and Loveland's Pr. pp. 151-155; see also Arch. Pr. 13th ed. pp. 1115-1135.

(*m*) Ibid.

(*n*) Rule 4 of November, 1878.

A special case (o) is a course sometimes resorted to by parties when they are agreed upon the facts of the case and only desire the decision of the Court upon some point or points of law. Directly after the writ of summons in an action is issued the parties may concur in stating any such special case; it is divided into paragraphs numbered consecutively, and is printed and signed by the respective parties or their solicitors (p). In addition to this special case by consent, if it appears to the Court or a Judge that there is in any action a question of law which it would be more convenient to have decided before any evidence is given on an issue of fact, an order may be made for such point of law to be raised for the opinion of the Court (q). No special case to which a person under disability is a party can be set down for argument without leave of the Court or a Judge, which will only be granted on shewing that the statements in such special case which affect such persons under disability are true (r).

The parties to any such special case may if they think fit enter into an agreement in writing, which shall not be subject to any stamp duty, that on the judgment of the Court being given in the affirmative or negative of the question or questions raised by the special case, a sum of money fixed by the parties or to be ascertained by the Court, or in such manner as the Court shall direct, shall be paid by one of the parties to the other of them either with or without costs of the action; and the judgment of the Court may be entered for the sum so agreed or ascertained with or without costs, as the case may be, and execution may

Rule of April,
1880, as to
special case.

(o) The special case here referred to must not be confused with a special case formerly used as a mode of commencing proceedings, and which is now, by Rule 10 of April, 1880, no longer to be used. See this also mentioned, post, p. 160, note (u).

(p) Order XXXIV. rr. 1, 3.

(q) Ibid. r. 2.

(r) Ibid. r. 4.

issue after such judgment forthwith unless otherwise agreed or unless stayed on appeal (s).

Costs on interlocutory applications.

On some interlocutory applications a direction is given as to the costs of the application, *e.g.*, that they are to be paid by one of the parties, that they are to be "costs in the cause," or are to be one of the parties' costs "in any event." The meaning of the expression "costs in the cause" is simply that the costs of the application follow the result of the general costs of the action, which indeed is usually the case; the meaning of the expression costs "in any event" is that one of the parties is to have the costs of the application in question whatever may be the ultimate result of the action.

Appeals from decisions in Chambers.

Where an application is made in Chambers to one of the Masters, he may, if he thinks fit, refer the matter to a Judge in Chambers. If he does not, nevertheless any person affected by his order or decision may appeal to a Judge in Chambers by summons within four days, and from thence to a Divisional Court within eight days (t).

Month's notice of proceeding.

When there has been no proceeding taken in an action for one year, the party, whether plaintiff or defendant, who desires to proceed must first give a calendar month's notice to the other party (u).

Discontinuance.

A plaintiff not desiring to continue his action may at any time before receipt of the defendant's statement of defence, or after the receipt thereof before taking any other proceeding in the action (save an interlocutory application), by notice in writing wholly discontinue his action or withdraw any part or

(s) Rule 9 of April, 1880.

(t) Order LIV. rr. 3-6.

(u) Arch. Pr. 13th ed. p. 180.

parts of alleged cause of complaint, but he must then pay the defendant's costs of the action, or, if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs are taxed and such discontinuance or withdrawal, as the case may be, is not a defence to any subsequent action. Subject to this it is not competent for the plaintiff to withdraw the record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before or at or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The Court or a Judge may, in like manner and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged ground of defence or counter-claim to be withdrawn or struck out, but it is not competent to a defendant to withdraw his defence or any part thereof without such leave (v)

(v) Order XXIII. See also as to countermand of notice of trial, Order XXXVI. r. 13, post, p. 89.

CHAPTER V.

TRIAL AND PROCEEDINGS TO CONCLUSION.

HAVING in the last Chapter considered the most usual interlocutory applications and proceedings in the course of an action, we may now continue its ordinary course, which we have pursued up to the close of the pleadings (*x*), and in which, therefore, the next step is to go to trial.

Notice of trial.

The first step towards the trial is to give notice of trial, which may be by the plaintiff with his reply, or at any time after the close of the pleadings (*y*). If he does not give notice of trial within six weeks after the close of the pleadings the defendant may then give notice of trial, or may apply to have the action dis-

Mode of trial.

missed for want of prosecution (*z*). The notice of trial specifies the mode of the trial, which may be either (1) before a Judge or Judges alone; (2) before a Judge with assessors; (3) before a Judge with a jury; or (4) before an official or special referee, sitting with or without assessors; but the defendant, upon giving notice within four days from the time of the service of the notice of trial, to the effect that he desires to have the issues of fact tried before a Judge and jury, is entitled to have the same so tried (*a*); so that this in effect gives either party a right to a jury. In any case in which neither plaintiff nor defendant has given notice requiring a jury, or when it is a case which

(*x*) See ante, p. 67.

(*y*) Order xxxvi. r. 3.

(*z*) Ibid. rr. 4, 4a.

(*a*) Ibid. rr. 2, 3.

ought to be referred to an official referee under sect. 57 of the Judicature Act, 1873 (*b*), either party may within four days of service of notice of trial apply to change the mode of trial; and the Court has power to order different issues to be tried in different modes (*c*). The Court or a Judge may also, if it appears desirable, direct a trial without a jury of any question or issue of fact or law, which previously without any consent could have been tried without a jury (*d*), that is, practically, all Chancery matters.

The length of the notice of trial is ten days, unless the defendant is under terms to take short notice (*e*), ^{Length of notice.} which is a four days' notice (*f*). When the defendant is under terms it is nevertheless usual to give as long a notice as the time will admit of, but this does not appear absolutely necessary, unless the order only puts him on terms to take short notice if necessary. If this is the case the defendant is not bound to take short notice unless it becomes necessary, and it is not necessary if the plaintiff has been guilty of unnecessary delay in joining issue or giving the notice (*g*). The notice of trial in London or Middlesex does not operate for any particular sittings, but is deemed to be for the first day on which the cause can be reached after the expiration of the notice; elsewhere than in London or Middlesex it is deemed to be for the next assizes at the place for which notice of trial is given (*h*). No notice of trial once given can be countermanded, except by consent or by leave of the Court or a Judge (*i*). ^{Countermand.}

The notice of trial having been given, the next step is to enter the cause for trial. In London or Middle- ^{Entry of cause for trial.}

(*b*) Ante, p. 77.

(*c*) Order XXXVI. rr. 5, 6.

(*d*) Ibid. r. 26. See also post, p. 125.

(*e*) See ante, p. 70.

(*f*) Order XXXVI. r. 9.

(*g*) Arch. Pr. 13th ed. p. 281.

(*h*) Order XXXVI. rr. 11, 12.

(*i*) Ibid. r. 13. See also order XXIII, ante, pp. 86, 87.

sex the party giving the notice should do so either on the day of the notice or the day after ; if, however, he does not, his opponent may enter it within the four subsequent days, making in all a period of six days within which the cause may be entered ; and if within that time neither party enters it the notice of trial falls through, and the action is in the same position as if no notice of trial had been given (*j*). Elsewhere than in London or Middlesex either party may, at any time before the day next before the Commission day, enter the cause for trial at the next assizes in the district registry (if any) of the city or town where the trial is to be had, or with the associate at the assize town, and if they both enter it, it is tried in the order of the plaintiff's entry. On entering the cause, two copies of the pleadings must be lodged for the use of the Judge (*k*).

The next thing to be done by the parties is to prepare for the trial ; and in the preparation for trial two notices that are usually given in actions should be observed, viz., a notice to produce documents at the trial, and a notice to inspect and admit documents.

Notice to
produce.

A notice to produce is simply a notice given by either plaintiff or defendant calling upon any other party to the action to produce certain documents at the trial. A form of such a notice is given in the Appendix (*l*) ; its object is that if the other party does not produce any documents in accordance with it he may give secondary evidence of their contents by copies or otherwise, which he would not be entitled to do if such notice had not been given (*m*). A notice to inspect and admit is simply a notice given in a like way, but calling on the other party to come and inspect certain documents at a certain time and place, and admit

Notice to
inspect and
admit.

(*j*) Order xxxvi. rr. 10a, 14.

(*k*) Order xxxvi. r. 15a of December, 1879, and 17a of December, 1875.

(*l*) Post, p. 201.

(*m*) See Indermaur's Principles of the Com. Law, 2nd ed. p. 383.

them, so as to save the expense of calling witnesses to prove them at the trial. A form of this notice is also given in the Appendix (n). If the other party neglects or refuses to admit the documents the costs of proving them at the trial will have to be paid by him whatever the result of the action may be, unless at the trial the Court certify that the refusal to admit was reasonable. No costs of proving any documents are allowed unless this notice is given, except where the omission to give it has been, in the opinion of the taxing officer, a saving of expense. The party, if he admits the documents, only admits them saving all just exceptions, which means that he does not thereby preclude himself in any way from contesting the validity of any document or objecting to it on the ground of its not being stamped or otherwise. When documents are admitted, an affidavit of the solicitor or his clerk of the due signature of the admission which is annexed to his affidavit is sufficient (o).

Before the day of the trial briefs are prepared on behalf of the respective parties to the action, containing a statement of the case of the party on behalf of whom the brief is given, and a list of the witnesses to be called on his behalf and particulars of what each witness will prove ; also notes as to the cross-examination of any witness expected to be called on the other side, and generally a brief should contain all such information as may be useful to counsel. A copy of the brief, the pleadings, the notices to produce and to inspect and admit, and any other necessary documents are delivered to each counsel employed on behalf of the particular party. Sometimes only one counsel is employed, sometimes two or more, according to the

(n) Post, p. 200.

(o) Order XXXII. The student should be very careful not to confuse this notice to inspect and admit given above with the notice to produce for inspection which may be given in the course of an action. The latter has for its object only the seeing the documents in the course of the action, see ante, pp. 75, 76.

importance of the case ; most usually there are two, a Queen's Counsel and a junior. Usually also before the trial a consultation or conference is arranged, so that counsel may be as far as is possible conversant with the facts. Fees are of course paid with the briefs and for the consultation or conference, and if the case is not reached at the sittings or assizes for which the brief is delivered a fee called a refresher is also paid, as is also the case if the trial of the action occupies more than one day.

Subpœnas, and
as to witnesses
generally.

The attendance of witnesses at the trial is enforced by means of subpœnas. A subpœna is a writ by which a person is commanded to appear at a certain place and time, and is either a writ of *subpœna ad testificandum* where a witness is simply required to give his oral testimony, or a *subpœna duces tecum* where, in addition, he is required to bring with him certain documents relating to the matters in question (*p*). Three names may be inserted in each subpœna, and a copy of the subpœna must be served personally on each witness, the original being shewn at the same time. It is usual on serving a subpœna to inform the witness he need not attend until he receives notice to do so, and afterwards to give the witness notice when the cause is coming on. A reasonable sum must be paid to each witness to defray his expenses of appearing under his subpœna, and he is justified in refusing to attend or to give evidence until his proper expenses are paid. If a material witness who has been properly served and to whom a reasonable sum for expenses has been paid or tendered does not obey his subpœna he is liable to attachment and also to an action. If a witness is resident in Scotland or Ireland a subpœna cannot be issued as a matter of course, but only by leave of the Court or a Judge. If a witness is in Her Majesty's dominions abroad a writ may be issued in the nature of a mandamus to the tribunals there for the examina-

Witnesses out
of jurisdiction.

(*p*) Brown's Law Dict. 2nd ed. tit. 'Subpœna, Writ of,' p. 511.

tion of the witness, or instead, and also in all cases where a witness is abroad not in Her Majesty's dominions, a commission may be issued for the examination of the witness there, and the evidence thus taken in either of these ways will be allowed and read at the trial. The evidence of a witness in Scotland or Ireland may also be taken by commission instead of issuing a subpoena by leave as above stated. If a person who is required as a witness is in custody on civil process his evidence is obtained by his being brought up on *habeas corpus ad testificandum* which is granted by a Judge in Chambers, but if in custody not on civil process an order to bring him up to give evidence must be obtained from one of the principal Secretaries of State or a Judge at Chambers (q).

Witnesses
in custody.

It sometimes happens that a person who will be required as a witness at the trial is about to go abroad, or is so ill that he is in danger of death. In such cases an order may be obtained for the examination of the witness before a master or some other person. In support of the summons for such an order it must be shewn by affidavit that the party is a material witness and that he is about to go abroad, or is dangerously ill, and in this latter case there must be an affidavit of the illness by a medical man. The evidence so taken cannot be used at the trial (except by consent), unless it is shewn to the satisfaction of the Judge at the trial that the deponent is unable to attend (r).

Taking evidence *de bene esse*.

The trial, in the majority of cases, takes place before Jury. The Judge and a jury (s), the jury being more usually

(q) See Arch. Pr. 13th ed. pp. 329-331.

(r) See Arch. Pr. 13th ed. pp. 301-304.

(s) All persons between twenty-one and sixty are liable to serve on a jury, provided they have the necessary property qualification, as described in notes (f) and (u), and also provided they are not exempted from so serving. The chief persons exempted are peers, judges, magistrates, clergymen, doctors, and barristers; but there are numerous other exemptions of less importance. A juryman who has been summoned, and fails to attend, is liable to be fined. Any party who is dissatisfied with a juryman on the ground of want of the necessary property qualification, or

a common jury (*t*), in which case they are ready as a matter of course, or it may be a special jury (*u*). Either plaintiff or defendant has, if he thinks fit, a right to a special jury; the course to obtain it being for the plaintiff to give notice to that effect with his notice of trial, or the defendant six days before the day of trial. In addition to this the Court or a Judge may at any time order that a cause shall be tried by a special jury upon such terms as they or he shall think fit. Notice is then given to the sheriff of the requiring a special jury and the action is marked as a special jury case in the associate's book. If, however, the notice for a special jury is given by the defendant in London or Middlesex for the purpose of delay, the Court may order the action to be tried before a common jury. The party who obtains the special jury has to pay all the extra costs occasioned by it, whatever may be the result of the action, unless the Judge before whom the action is tried within a reasonable time after the trial certifies that the cause was one proper to be tried before a special jury (*v*).

View by jury. When it appears advisable on account of the nature of the case an order may be made for the jury to view the place or premises the subject of the action (*w*).

The trial. Finally, the action in its due order comes on to be tried, and taking there to be two counsel on each side, it usually proceeds as follows:—The plaintiff's junior counsel states shortly the effect of the pleadings, and the senior counsel states his client's case;

by reason of some supposed bias or partiality, or on some other grounds, may object to him, which objection is called a challenge. The jury are summoned to attend by the Sheriff (Arch. Pr. 13th ed. pp. 385–393.)

(*t*) The main qualifications of a common juror are that he should have £10 a-year from freeholds or copyholds, or £20 a-year in leaseholds, or be a householder rated or assessed to the poor-rate, or to the inhabited house duty in Middlesex, on a value of not less than £30, or in any other county not less than £20 (Arch. Pr. 13th ed. p. 385).

(*u*) Special jurors are persons of a higher degree than common jurors, such as bankers or merchants (Arch. Pr. 13th ed. p. 386).

(*v*) Arch. Pr. 13th ed. pp. 335, 338, 456.

(*w*) Ibid. 339, 340.

the witnesses are then called and respectively examined by one of these counsel; cross-examined, if necessary, by the senior counsel on the other side, and then, if necessary, re-examined on any new points that have been raised by the cross-examination. The plaintiff's case being closed, the defendant's senior counsel states his client's case, and, in the same way as was done by the other side, his witnesses are now called and examined, cross-examined, and re-examined. He then addresses the jury on the evidence, and the plaintiff's senior counsel replies on the whole case. The Judge then sums up, telling the jury the points on which their verdict is required; and when they have considered the matter, they announce their verdict through the foreman they have chosen amongst themselves (*x*). If after the plaintiff's case is closed, the defendant's counsel announces that he does not intend to call any witnesses, the plaintiff's counsel must at once address the jury, and the defendant's counsel concludes with his address, thus having the last word to the jury. In the foregoing remarks it is put as if the plaintiff's counsel always commences, and so it is almost invariably; but the general rule is that the party to begin is he on whom the affirmative in the action lies, or, more correctly, the one who in the absence of proof on either side would substantially fail in the action. In cases, however, of slander, libel, and other actions for personal injuries where the plaintiff seeks to recover actual damages of an unascertained amount he is always entitled to begin, although the affirmative of the issue may in point of form be with the defendant (*y*). Right to begin at the trial.

The verdict is the unanimous decision of the jury The verdict. on the facts submitted to them; if they cannot agree on their verdict after a reasonable time, unless the

(*x*) In the above nothing is said about the evidence being by affidavit, because such a thing in the Divisions in which we are now considering the practice is not usual. Evidence by affidavit often occurs in the Chancery Division, and is dealt with post, pp. 125, 126.

(*y*) Arch. Pr. 12th ed. pp. 354, 355.

TRIAL AND PROCEEDINGS TO CONCLUSION.

parties agree to accept the verdict of a majority, they are discharged, and the action must be tried again.

postponement
of the
drawing
or.
uit.

It sometimes happens that at the trial one of the parties finds it necessary to apply for a postponement. This application may be granted on good grounds, but it is usually only done on the terms that the party applying pays the costs of the day—that is, those costs which will have to be incurred over again on account of the postponement, such as the issuing of fresh subpoenas, refreshers to counsel, &c.

In the course of a trial, sometimes the parties agree that the action shall come to an end, and that each party shall pay his own costs. This object is accomplished by withdrawing a juror, and the action cannot then be brought over again (z).

A nonsuit is, technically, where the plaintiff does not appear at the trial, and the defendant succeeds by his default. A nonsuit, however, more usually occurs where the plaintiff finds he cannot succeed in his action, and voluntarily submits to be nonsuited—that is, to let it be considered as if he were not present. He cannot be nonsuited against his will. A nonsuit formerly had this advantage over a verdict for the defendant, viz., that the plaintiff might bring the same action over again, so that in many cases a plaintiff would submit to be nonsuited in the hope that at the next trial he might have some additional evidence, or in other way be better prepared (a); but it has not now any such advantage, it being provided that any judgment of nonsuit, unless otherwise ordered, shall have the same effect as a judgment upon the merits for the defendant, except that it may be set aside in cases of mistake, surprise, or accident, on such terms as to the Court or a Judge shall seem just (b).

(z) Arch. Pr. 13th ed. p. 376.

(a) Ibid. pp. 377, 378.

(b) Order xli. r. 6.

The effect, then, of the plaintiff not appearing at the trial while the defendant does, is that a judgment of nonsuit, or judgment dismissing the action, is entered; but in addition to this, if the defendant has any counter-claim, he may prove such claim so far as the burden of proof lies on him (*c*). If the defendant does not appear at the trial, while the plaintiff does, the plaintiff may prove his claim so far as the burden of proof lies on him (*d*). Any verdict or judgment, however, obtained where one party does not appear at the trial, may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within six days after the trial either at the Assizes or in Middlesex (*e*). If neither party appears at the trial, the cause is struck out. The Court or a Judge may, if he thinks it expedient in the interest of justice, postpone or adjourn a trial for such time or upon such terms (if any) as he thinks fit (*f*).

Effect of plaintiff and defendant respectively not appearing at trial.

Judgment—that is, the sentence of the law pronounced by the Court upon the matter appearing from the previous proceedings in the action (*g*)—follows on the verdict. Upon the trial of an action the Judge may at or after the trial direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. No judgment can be entered after trial without the order of a Court or Judge (*h*). In all ordinary cases the Judge, either at the trial or after argument on some subsequent day, directs judgment to be entered in accordance with the verdict; but if he abstains from doing so, the judgment of the Court must be obtained by motion for judgment (*i*). If the plaintiff does not so set the cause down on motion for judgment, and give notice to the other

(*c*) Order xxxvi. r. 20.

(*d*) Ibid. r. 18.

(*e*) Ibid. r. 20.

(*f*) Ibid. r. 21.

(*g*) See Brown's Law Dict. 2nd ed. p. 290, tit. 'Judgment.'

(*h*) Order xxxvi. r. 22a of December, 1876.

(*i*) Order xl. r. 1.

parties within ten days after the trial, any defendant may do so (*k*); and no action, except by special leave, can be set down on motion for judgment after the expiration of one year from the time when the party seeking to set down the same first became entitled to do so (*l*). At the hearing of this motion the Court decides which of the parties is entitled to judgment under the verdict given on the facts. In some cases the Judge at the trial directs judgment to be entered for one of the parties, subject to leave reserved to the other to move the Divisional Court for judgment in his favour. This motion should be made within ten days after the trial (*m*). If, however, the Judge has not reserved any leave to move, but has simply directed judgment to be entered for one of the parties, any party may apply to set aside the judgment, and to enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the Judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them, or upon the ground that upon the finding so entered the judgment so directed is wrong. Any such application as last mentioned is made to the Court of Appeal (*n*).

Explanation.

The cases in which a Judge would decline to direct judgment to be entered at the trial, or in which, though directing it to be entered, he would reserve leave to move, or in which the other party, even without such leave, would apply to set aside the judgment, are cases in which on the special facts of the case as found by the jury there is, or is considered to be, a doubt as to which of the parties is in law entitled to the judgment. In all ordinary and simple cases there is no such doubt, and judgment goes, as a matter of course, in accordance with the verdict.

(*k*) Order XXXVI. r. 3.

(*l*) Order XL. r. 9.

(*m*) Ibid. r. 2.

(*n*) Ibid. r. 4a. As to appeal generally, see post, Part IV.

An application not at all unfrequently made after New trials. verdict is for a new trial. The following are the chief grounds of the application:—(1.) That the Judge has misdirected the jury upon some point of law; (2.) That he has wrongfully admitted or rejected certain evidence; (3.) That the verdict is against the weight of the evidence; (4.) That the damages are excessive; (5.) That the damages are too small (*o*); (6.) The misconduct of the jury, as if they cast lots to decide the verdict (*p*). No new trial can, however, be granted on the grounds numbered one and two, viz., misdirection, or wrongful admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned to the trial of the action, and if it appears to the Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give a new trial as to that part only, without in any way interfering with the finding or decision upon any other question (*q*). With regard to the ground given above, numbered three, viz., that the verdict is against the weight of the evidence, the Court is, in granting a new trial, in a great measure guided by whether the Judge who tried the cause is satisfied with the verdict or not (*r*); and therefore it follows that though when a trial has taken place before a Judge without a jury the Court has full power to grant a new trial if it sees fit (*s*), yet it will not usually do so on this ground.

The application for a new trial is made to a Divisional Court, unless the trial has been by a Judge without a jury, when the application is made to the Court of Appeal (*t*). The application to a Divisional

To whom
application for
new trial
made; time
for, &c.

(*o*) A very strong case however has to be made out to succeed on either of the grounds numbered four and five.

(*p*) See Arch. Pr. 13th ed. pp. 1210–1236.

(*q*) Order XXXIX. rr. 3, 4.

(*r*) Arch. Pr. 13th ed. p. 1215.

(*s*) Order LVIII. r. 5a of March, 1879.

(*t*) Order XXXIX. r. 1 of November, 1876.

PROCEEDINGS TO CONCLUSION.

APPEAL. If the trial has taken place in London or elsewhere, the appeal must be made within four days after the trial, and the first subsequent day on which a Divisional Court sits. If the trial has taken place elsewhere, the appeal must be made within seven days after the last day of sittings in the circuit, or within the first four days of the following sittings if the trial has taken place during a recess within a week immediately after the trial. If the application for a new trial is made to the Court of Appeal, it is treated as an appeal and may be made within the same time limits. If a rule nisi is made for a new trial, the applicant must shew cause for the same within eight days therefrom, or so soon thereafter as the case can be heard (y), and a copy of the rule nisi must be served within four days from being made, and the rule operates as a stay of proceedings (z).

When judgment is given for judgment, or for a new trial, the Court considers that it has not sufficient materials to direct the motion to stand over for further consideration and direct any issues to be tried.

When judgment is pronounced, it is afterwards duly entered by the proper officer of the Court, being dated with the day on which it was pronounced, and from which time it takes effect (b). After judgment the successful party proceeds to tax his costs, the amount entered being added to the judgment (c).

The judgment being thus complete, if payment of the amount is not made, the next thing is to enforce

See *Krehl v. Burrell*, 48 L. J.

See *Krehl v. Burrell*, 48 L. J. (Ch.) 252.

See *Krehl v. Burrell*, 48 L. J. 252.

See *Krehl v. Burrell*, 48 L. J. 252.

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See *Krehl v. Burrell*, 48 L. J. 252.

it, which is most usually done by issuing execution (*d*). Execution is issued by producing to the proper officer the judgment or an office copy with a *præcipe* containing the title of the action, &c., and a form of writ of execution, which must be indorsed with the name of the solicitor issuing it, and if he is agent, then with the two names, and also with a direction to the sheriff or other officer or person to whom the writ is directed, to levy the amount actually due (*e*). If after the judgment a part of the amount is paid, the body of the writ nevertheless pursues the judgment strictly, but the indorsement is only to levy the actual amount due. A writ of execution may be issued on a judgment directly it is duly entered, unless the Court or Judge directs it to be postponed, as may be the case. Execution must be issued within six years of the judgment, and before any change in the parties has occurred by death or otherwise, unless leave is obtained from the Court or a Judge to issue execution afterwards. The writ of execution remains in force for one year, but may be renewed for one year from the date of renewal, and so on from time to time, by the writ itself, or a notice of renewal to the sheriff, being marked with the seal of the Court, bearing the date of the renewal, which is sufficient evidence of the renewal (*f*).

The chief writs of execution that may be issued in ordinary cases are writs of *fieri facias*, *capias ad satisfactionem*, and *elegit*. Writs of execution.

A writ of *fieri facias* (shortly called a writ of *fi. fa.*), *Fieri facias*. is a writ directed to the sheriff commanding him that of the goods and chattels of the debtor he do cause to be made the sum indorsed on the writ, together with interest at 4 per cent. (*g*). The sheriff executes this

(*d*) Order XLII. r. 1.

(*e*) Order XLII. rr. 9-14.

(*f*) Ibid. rr. 15-19.

(*g*) Brown's Law Dict. 2nd ed. tit. 'Fi. fa.,' p. 229.

writ by taking possession of the party's goods and chattels, and selling the same.

Ca. sa.

A writ of *capias ad satisfaciendum* (shortly called a writ of *ca. sa.*) is a writ of execution commanding the sheriff to seize the body of the debtor and keep it to satisfy the amount due (*h*). This writ cannot however now often issue, in consequence of the Debtors Act, 1869 (*i*).

Elegit.

Mode in which
judgment
debtor can
recover back
his lands when
judgment
satisfied.

A writ of *elegit* (*k*) is a writ of execution to the sheriff commanding him to appraise the goods of the debtor, instead of selling them, and to deliver them to the judgment creditor in satisfaction, or part satisfaction, of the judgment debt according to their appraised value. If this is not sufficient to satisfy the judgment debt, then the lands themselves may be taken possession of, and the judgment creditor holds them until out of the profits his debt is satisfied (*l*). When the judgment debtor is satisfied there are various ways in which he can recover back his lands, but the most proper and advisable mode of proceeding is to apply to the Division out of which the *elegit* issued to refer it to one of the Masters to ascertain the amount of the rents and profits received, and to order that if it appear that the debt, &c., is satisfied, possession shall be delivered to the debtor (*m*).

In many cases the debtor may not have any goods or lands on which execution can be levied, but there are two other modes of enforcing the judgment, which though equally applicable in all cases, may be specially useful then; viz., a garnishee order, and a charging order.

(*h*) Brown's Law Dict. 2nd ed. tit. 'Capias ad Satisfaciendum,' p. 76.

(*i*) 32 & 33 Vict. c. 62. See Indermaur's Principles of the Com. Law, 2nd ed. pp. 304-306.

(*k*) It may be noticed that this writ of *elegit* practically superseded a former process by writ of *Levari facias*, which commanded the sheriff to seize the judgment debtor's lands and chattels, and not deliver them to the judgment creditor, but collect thereout sufficient for him (see Arch. Pr. 13th ed. pp. 601, 602).

(*l*) Brown's Law Dict. tit. 'Elegit,' p. 198; Arch. Pr. 13th ed. pp. 588-601.

(*m*) Arch. Pr. 13th ed. p. 601.

A garnishee order is an order obtained by a judgment creditor against some third party who owes money to the judgment debtor, commanding him to pay such money to the judgment creditor, in satisfaction, or part satisfaction, of his debt. It is obtained on an *ex parte* application of the judgment creditor, supported by the affidavit of himself or his solicitor, that judgment has been recovered, and to what amount, and is still unsatisfied, and that some third person within the jurisdiction is indebted to the judgment debtor; and upon this the Court or a Judge may order such debt to be attached, and also order the third person, who is called the garnishee, to appear and shew cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt (*n*). Service of this order binds the debt in the garnishee's hand from that time, and if he does not pay the amount claimed into Court, or dispute the debt, or appear on the summons, execution may be issued against him for the amount (*o*); if, however, the garnishee disputes his liability, an issue may be directed to try the question (*p*). If a judgment creditor does not actually know any one who owes money to the judgment debtor, but has reason to suspect that some such debt may be owing, he may obtain an order, in the first instance, for the oral examination of the judgment debtor as to whether any and what debts are owing to him, and for the production of any books or documents (*q*).

A charging order is an order charging the amount Charging order.

(*n*) Order XLV. r. 2.

(*o*) Ibid. r. 4.

(*p*) Ibid. r. 5.

(*q*) Ibid. r. 1. Notwithstanding that Order XLII., r. 20, provides that every order of the Court or a Judge may be enforced in the same manner as a judgment to the same effect, it has been held that a party to whom money is due under an order cannot obtain a garnishee order as he could if the money were due to him under a judgment (*Cremetti v. Crom*, 48 L. J. (Q. B.) 337.).

of any judgment upon stock of the judgment debtor. When any judgment debtor has any Government stocks or funds, or any stocks or shares in his own right, any judgment creditor may apply for an order for the same to stand charged with the judgment debt, and any such order entitles the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor, except that no proceedings can be taken to have the benefit of such charge until after the expiration of six calendar months from the date of the order. Any such order is, in the first instance, *ex parte* only, and may be varied or discharged on due cause shewn (*r*).

Enforcing
judgments
when not for
land or money.

A judgment for the recovery of any property other than land or money may be enforced by writ for delivery of the property, by writ of attachment, or by writ of sequestration (*s*).

Writ for
delivery.

A writ for delivery is a writ commanding the delivery up of certain property, and can be enforced by the sheriff distraining on the lands and goods of the person till the same is delivered (*t*).

Writ of at-
tachment.

A writ of attachment is a writ directed to the sheriff (*u*) commanding him to attach or imprison a certain person on account of his contempt of Court. No writ of attachment can be issued without the leave of the Court or a Judge, to be applied for on notice to the party against whom the attachment is to be issued (*x*).

(*r*) 1 & 2 Vict. c. 110, ss. 14, 15, and Order XLVI. r. 1. See also enactments hereon fully set out in Griffith and Loveland's Pr. pp. 412, 413. The Masters have now jurisdiction to act in respect of charging orders. Rule 4 of November, 1878.

(*s*) Order XLII. r. 4.

(*t*) Order XLIX.; Arch. Pr. 13th ed. pp. 618-620.

(*u*) An attachment against a sheriff is directed to the coroner, and an attachment against a sheriff is directed to elisors.

(*x*) Order XLIV.; Arch. Pr. 13th ed. pp. 1387-1395. See also as to Attachment, post, p. 156.

A writ of sequestration is a writ issued for the purpose of levying on a person's property on account of his disobedience to the judgment or order of the court (y). No sequestration to enforce payment of costs only can now be issued without leave of the Court or a Judge (z).

A judgment for recovery of land is enforced by a writ of possession, which is a writ issued to the sheriff directing him to put the party in possession of certain lands (a).

Where a defendant against whom a judgment has been recovered is a clergyman, there are two writs of execution that may be issued with regard to his benefice; viz., a writ of *feri facias de bonis ecclesiasticis*, and a writ of *sequestrari facias*. These writs are very similar in their nature, being both directed to the bishop of the diocese, and having for their object the raising of the amount of the judgment debt out of the property of the benefice (b).

The student will remember that actions may be brought against a partnership firm in its partnership name without enumerating the particular persons constituting the partnership (c). As a doubt might naturally arise in some cases as to whether a certain person is or is not a member of the firm in question, and accordingly whether or not execution may be issued against him, it is specially provided that execution may be issued (1) against any of the direct partnership property, or (2) against any person who has admitted on the pleadings that he is, or who has been adjudged to be, a partner, or (3) against any person who has

(y) Order XLVII.; Arch. Pr. 13th ed. pp. 621-623.

(z) Rule 31 of April, 1880.

(a) Griffith and Loveland's Pr. pp. 415, 416.

(b) Arch. Pr. 13th ed. pp. 1062-1064.

(c) Ante, pp. 40, 42.

been served as a partner with the writ and has failed to appear; and in addition to this, (4) that if the judgment creditor claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a Judge for leave to do so, and the Court or a Judge may give such leave if the liability is not disputed, or if disputed may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined (*d*).

Production of judgment on issuing execution.

No writ of execution can be issued without the production to the officer by whom the same should be issued of the judgment upon which the writ of execution is to issue, or an office copy thereof shewing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

Enforcing an order.

Any order of the Court or a Judge may be enforced in the same manner as a judgment to the same effect (*e*).

Judgment *quando acciderint*.

One special kind of judgment should be here mentioned, though not very often occurring. If an action is brought against an executor or administrator and he in his defence states that he has fully administered all assets come to his hands—that is, exhausted all assets—or all except some small amount, (called formerly pleas of *plene administravit* and *plene administravit præter* respectively), if the plaintiff cannot disprove this defence he may sign a judgment against any assets which may at any time afterwards come to the defendant's hands. This is called a judgment *quando acciderint* (*f*).

(*d*) Order XLII. r. 8.

(*e*) Ibid. r. 20.

(*f*) See Brown's Law Dict. 2nd ed. p. 435, tit. 'Quando acciderint.'

Formerly, on such a judgment, when assets afterwards came to the hands of the executor or administrator, the plaintiff must, to have taken advantage of them, have first sued out a writ of *scire facias* (*g*) against such executor or administrator before he could have execution (*h*). This, however, is not now the proper course, it being provided that where a judgment is to the effect that any party is entitled to any relief subject to or upon the fulfilment of any condition or contingency, the party so entitled may, upon the fulfilment of the condition or contingency, and demand made upon the party against whom he is entitled to relief, apply to the Court or a Judge for leave to issue execution against such party. And the Court or Judge may, if satisfied that the right to relief has arisen according to the terms of the judgment, order that execution issue accordingly, or may direct that any issue or question necessary for the determination of the rights of the parties be tried in any of the ways in which questions arising in an action may be tried (*i*). The proper course, therefore, for a creditor to take who has obtained such judgment, and who has ascertained that assets have come to the executor's or administrator's hands, is to serve a demand for payment, and then apply by summons for leave to issue execution, supporting his application by affidavit shewing that such assets have come to the executor's hands and that such demand has been made.

Where judgment has been recovered in an inferior Court of Record and there is no property of the defendant within its jurisdiction, the judgment can by order of a Judge be removed into the High Court (irrespective

How execution obtained under such a judgment.

Removal of judgment of inferior Court for purpose of execution.

(*g*) A *scire facias* is a judicial writ founded upon some record, and requiring the person against whom it is brought to shew cause why the person bringing it should not have advantage of such record, or (as in the case of a *scire facias* to repeal letters patent) why the record should not be annulled and vacated (Arch. Pr. 13th ed. p. 934).

(*h*) Arch. Pr. 13th ed. p. 933.

(*i*) Order XLII. r. 7.

of the amount of the judgment) and execution issued thereon in the ordinary way (*k*).

Costs generally.

The judgment being enforced, the whole object of the action is accomplished and it is at an end. This chapter would, however, be incomplete without a short consideration of the subject of the costs that a plaintiff or a defendant is entitled to and is able to include in his judgment and to enforce against the other party.

The subject of costs at Common Law was, prior to the Judicature Acts, one of great intricacy and difficulty, and though it cannot even now be said to be perfectly plain and clear, yet it is much simpler than formerly; there appears to be no good object to be accomplished in a work like the present by going fully into the former position, for such a course would, in the author's opinion, tend only to confuse the student.

Provision of Judicature Act, 1875, Order LV.

The Judicature Act, 1875, provides that costs are to be in the discretion of the Court, but that this shall not deprive a trustee, mortgagee, or other person of any right to costs out of a particular estate or fund to which he would be entitled according to the former rules of Equity, provided that where any action or issue is tried by a jury the costs shall follow the event unless upon application made at the trial for good cause shewn the Judge before whom such action or issue is tried, or the Court, shall otherwise order (*l*).

County Courts Act, 1867.

Prior, however, to this the County Courts Act, 1867, had provided that if in any action in one of the Superior Courts the plaintiff should recover a sum not exceeding £20 on contract or £10 on tort he should not be entitled to any costs unless the Judge certified that there was sufficient reason for bringing such

(*k*) Arch. Pr. pp. 1415, 1416. As to removal in other cases, see 19 & 20 Vict. c. 108, s. 38, and Arch. Pr. pp. 1411, 1418.

(*l*) Order LV.

action in the Superior Court, or unless the Court or a Judge at Chambers should by rule or order allow such costs (*m*).

By the Judicature Act, 1873 (*n*), it is enacted that such provision shall apply to all actions commenced or pending in the High Court of Justice in which any relief is sought which can be given in a County Court. Provision of Judicature Act, 1873, sect. 67.

Therefore, since the Judicature Acts, where the action or issue is tried by a jury (except it is a case within sect. 5 of the County Court Acts, 1867, above mentioned, in which the relief could have been given in a County Court), the party succeeding recovers his costs from his opponent unless the Judge at the trial, or the Court, otherwise order, and this is so whatever he may recover, even though it be but a farthing, for though under certain statutes formerly this would not have been so, yet those statutes are now impliedly repealed by the Judicature Acts (*o*).

The general position as to costs may now be shortly stated to be, that whoever succeeds in the action will get his costs, except that in the case of the plaintiff being the successful party, if the amount does not exceed £20 on contract or £10 on tort, and he might have brought his action in the County Court, he cannot get costs without a certificate as above mentioned. A special order altering this general rule as to costs may however be made. In consequence of the provisions of the County Courts Act, 1867, it follows that actions in which the amount sought or expected to be recovered does not exceed the sums mentioned, should always be commenced in a County Court, except indeed where the County Court has Statement of position now.

(*m*) 30 & 31 Vict. c. 142, s. 5.

(*n*) 36 & 37 Vict. c. 66, s. 67.

(*o*) *Garnett v. Bradley*, L. R. 3 H. L. 944; 48 L. J. Q. B. (H. L.) 186; Arch. Pr. 13th ed. p. 420.

no jurisdiction, which cases are breach of promise of marriage, libel, slander, malicious prosecution, and seduction. Except in these cases the County Courts have jurisdiction up to £50, also in actions to recover any lands or try any title thereto where neither the value of the property nor the rent exceeds £20, and also to recover small tenements from tenants at sufferance when the annual rent or value does not exceed £50 (*p*).

Costs on set-offs
and counter-
claims.

Where in cases coming within the County Courts Act, 1867, by reason of a set-off the plaintiff recovers only a balance which is less than the sum mentioned in the Act, he does not get his costs without a certificate. If, however, the defendant's claim is a counter-claim as distinguished from a set-off, then it is different,—the plaintiff will get his full costs, and the defendant any costs in respect of the counter-claim (*q*).

Where the defendant actually recovers on his counter-claim a balance against the plaintiff, though the amount is not exceeding £20 on contract or £10 on tort, the County Courts Act does not apply, and he gets his costs (*r*); and if his counter-claim is for a liquidated amount, and not for damages, he will get the whole costs of the cause, and not merely the costs on the counter-claim (*s*).

Where in an action there is a counter-claim, and both claim and counter-claim are dismissed with costs, the defendant has only to pay the sum by which the costs have been increased by the counter-claim (*t*).

(*p*) See 9 & 10 Vict. c. 95; 13 & 14 Vict. c. 61; 30 & 31 Vict. c. 142. As to their jurisdiction in matters coming within the Chancery Division, see post, p. 159.

(*q*) *Stooks v. Taylor*, 5 Q. B. D. 569; 29 W. R. 49; *Bains v. Bromley*, 29 W. R. 245.

(*r*) *Blake v. Appleyard*, 3 Ex. D. 195; 49 L. J. Ex. 407.

(*s*) *Bains v. Bromley*, 29 W. R. 245.

(*t*) *Saner v. Bilton*, 11 Ch. D. 416.

Where the verdict of a jury is in the plaintiff's favour, and if not otherwise ordered he would get his costs, the Judge at the trial, or the Court, will in general make an order under the latter part of Order iv. (*u*) depriving the plaintiff of his costs where the action is a frivolous one or there was no necessity for bringing it. And a plaintiff successful at the trial may not only be deprived of his costs, but he may be ordered to pay the defendant's costs (*x*). So if a defendant obtains a verdict an order may in some cases be made depriving him of his costs (*y*). Any such order as to costs only is not subject to any appeal except by leave of the Court or Judge making such order (*z*). Depriving successful party of costs.

The costs given against an opponent are taxed before one of the Masters. A copy of the bill of costs is delivered to the opponent's solicitor, together with one day's notice of an appointment to tax same, and, if required, an affidavit of increase must be made. This affidavit of increase is an affidavit made by the solicitor or his managing clerk (who must depose that he has had the management of the action), verifying the payments to counsel, to witnesses, length of brief, &c. The costs having been taxed, the amount thereof is filled in the judgment by the Master (*a*). Taxation.

The costs in these Divisions of the Court are (subject to the discretion of the Court), taxed under what is known as the Lower Scale (*b*). Lower scale of costs.

The costs that are obtained against an opponent in an action are called party and party costs, and those that a solicitor charges against his own client are Difference between party and party, and solicitor and client costs.

(*u*) Ante, p. 108. The application to the Judge or the Court is an alternative and not on appellate jurisdiction. *Marsden v. Lanc. and York Ry. Co.*, 50 L. J. Q. B. (App.) 318.

(*x*) *Harris v. Petherick*, L. R. 4 Q. B. D. 611 : 48 L. J. Q. B. 521.

(*y*) Arch. Pr. 13th ed. pp. 420, 421.

(*z*) Jud. Act, 1873, s. 49.

(*a*) As to regulations generally as to costs, see Additional Rules of Court, of 12 Aug. 1875, Order vi. set out in Griffith and Loveland's Pr. pp. 559-577.

(*b*) Ibid. ; see post, p. 159.

called solicitor and client costs. The difference is that party and party costs comprise only things actually necessary in the action; but solicitor and client costs include not only this, but in addition anything advisable under the circumstances, *e.g.*, conferences with counsel, &c. From this it follows that items may be disallowed in a solicitor's bill taxed as between party and party which he may be entitled to charge against his client as being proper solicitor and client costs.

Delivery of
solicitor's bill,
and taxation
by client.

A solicitor before he can sue a client for his bill of costs, must have delivered it signed, or with a letter signed, a month previously (*c*), unless he can shew that there is probable cause to believe that his client is about to quit England, or to become a bankrupt, or a liquidating or compounding debtor, or to take any other steps or do any other act which in the opinion of the Judge would tend to defeat or delay such solicitor in obtaining payment, when leave may be given him to sue notwithstanding the month has not expired (*d*). Every client has a right to have his solicitor's costs taxed; within a month of the delivery of the bill he may obtain an order for taxation as of course; after a month, he may still obtain this order on application *ex parte* by summons; but after the expiration of twelve months, or after payment, he can only obtain an order to tax on shewing special circumstances, *e.g.*, gross overcharge, or that the bill was paid under protest. If on taxation less than one-sixth is taxed off, the client has to pay the costs of the taxation; but if one-sixth is taxed off, then the solicitor has to pay such costs (*e*).

(*c*) 6 & 7 Vict. c. 73.

(*d*) 38 & 39 Vict. c. 79.

(*e*) 6 & 7 Vict. c. 73, s. 37. See further as to solicitors' costs, 33 & 34 Vict. c. 28. See also hereon Arch. Pr. 13th ed. pp. 120-133.

CHAPTER VI.

ARBITRATION.

THE subject of arbitration may no doubt occur either in the Queen's Bench or the Chancery Division, but, as more frequently occurring in the former, it would appear most convenient to deal with the subject in this place, at the end of the ordinary proceedings in an action.

Arbitration may be defined as the settling of disputes otherwise than in the ordinary way, by some person or persons specially chosen by the parties or by the Court.

It may occur in two ways, (1) Compulsorily; (2) By Consent.

Firstly. As to Compulsory Arbitration.

1. Compulsory arbitration.

This takes place under the provisions of the Common Law Procedure Act, 1854 (*f*), which enacts that, "If it be made to appear at any time after the issuing of the writ to the satisfaction of the Court or a Judge upon the application of either party that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or Judge, upon such application, if they or he shall think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court, or, in country causes, to the Judge

Provision of C. L. P. Act, 1854.

(*f*) 17 & 18 Vict. c. 125.

of any County Court, upon such terms as to costs and otherwise as such Court or Judge shall think reasonable; and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforced by the same process as the finding of a jury upon the matter referred" (g). This is an enactment of importance, and not only may an order be made under it on the application of either party by summons, but a Judge at *nisi prius* may also make an order under it (h).

Special case on points of law, &c. If under such a compulsory reference a question of law arises provision is made for a special case to be stated, and if any question arises on it which ought to be tried by a jury, an issue or issues may be directed to be tried (i).

Arbitration different from reference to referee. The provisions of the Judicature Acts before detailed as to referees (j) must not be confused with the foregoing enactment. The Judicature Acts have not taken away the power above given to refer to arbitration, and in such an arbitration an arbitrator cannot be required to report, but his decision is final and not liable to be reviewed by the Court except on the grounds on which an award might have been reviewed prior to the Judicature Act, 1873 (k).

Time for making award. The order for reference being made, the arbitrator must make his award within three months after his appointment and entering on the reference, or his being called upon to act by a notice in writing, unless the order of reference contains a different limit of time. The time may, however, be enlarged by consent of the parties in

(g) 17 & 18 Vict. c. 125, s. 3.

(h) Arch. Pr. 13th ed. p. 1379.

(i) 17 & 18 Vict. c. 125, s. 4. See also sect. 5.

(j) Ante, pp. 24, 25.

(k) *Cruikshank v. The Floating Swimming Bath Co.*, L. R. 1 C. P. D. 260; 45 L. J. C. P. 684.

writing. The award need not be stamped, but it must be signed by the arbitrator (*l*).

All applications to set aside any award made on a compulsory reference must be made within the first seven days of the term next following the publication (*m*). The power of the Court to set aside awards on compulsory references is the same as on references by consent (*n*).

Setting aside award.

Any award made on a compulsory reference is enforced in the same way as the finding of a jury upon the matters referred, and by the authority of a Judge, on such terms as to him may seem reasonable, at any time after seven days from the time of publication, notwithstanding that the time for moving to set it aside has not elapsed (*o*).

Enforcing award.

Secondly. As to Arbitration by Consent (*p*).

2. Arbitration by consent.

Irrespective of the compulsory order of reference before referred to, the parties to an action may always agree to an order of reference, and in addition, if no action is pending, any matters in dispute may usually be referred by agreement in writing. The Court has no jurisdiction over the matter until the submission is made a rule of Court, but any such submission may be made a rule of Court upon the application of any party thereto, unless there is any provision in it to the contrary (*q*).

Submission must be made a rule of Court

An arbitrator may be named in the submission, but where this is not so, if the submission provide that the reference is to be to a single arbitrator, and all

Appointment of arbitrator, umpire, &c., when not named in reference.

(*l*) 17 & 18 Vict. c. 125, s. 15.

(*m*) Sect. 9.

(*n*) Arch. Pr. 13th ed. p. 1381. As to which see post, p. 118.

(*o*) 17 & 18 Vict. c. 125, ss. 3, 10.

(*p*) See fully as to this subject, Arch. Pr. 13th ed, pp. 1306-1377.

(*q*) 17 & 18 Vict. c. 125, s. 17. But although this is so, the submission should contain an agreement that it should be made a rule of Court, as otherwise it may be revoked, even although it may have been made a rule of Court. *In re Rouse*, L. R. 6 C. P. 212.

the parties cannot agree in his appointment, or if any appointed arbitrator die or cannot act, or if where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator they do not appoint him, or if he being appointed refuse to act, die, or become incapable of acting, and the parties or arbitrators do not appoint a new one, then and in every such case, in the absence of anything to the contrary in the submission, any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire, or third arbitrator respectively; and if within seven clear days after such notice shall have been served, no arbitrator, umpire, or third arbitrator be appointed, it is lawful for a Judge, upon summons to be taken out by the party having served such notice as aforesaid, to appoint an arbitrator, umpire, or third arbitrator, as the case may be, who shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties (r).

Failure to
appoint
arbitrator, &c.

When the reference is to two arbitrators, one appointed by each party, it is lawful for either party, in the event of the death, refusal to act, or incapacity of any arbitrator appointed by him, to appoint a new arbitrator, unless the submission provides to the contrary; and if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party shall have appointed an arbitrator, and shall have served the party so failing to appoint with notice in writing to make the appointment, the party who has appointed an arbitrator may appoint such arbitrator to act as sole arbitrator in the reference, and an award made by him is as binding on both parties as if the appointment had been by consent (s).

(r) 17 & 18 Vict. c. 125, s. 12.

(s) Ibid. s. 13.

The mode of conducting an arbitration depends much on the circumstances of the case, but the matter should be gone into and the evidence heard by all the arbitrators, and they have power to administer oaths and hear witnesses. If the submission limits no time, the arbitrators should make their award within three months after appointment and entry on the reference, or being called upon to act by a notice in writing from any party; but the parties may by consent in writing enlarge the time for making the award. The attendance of witnesses before arbitrators may be enforced by rule or order (*t*). Mode in which reference to be conducted, time for award, &c.

If in the course of the reference any question of law arises, it may be stated in the award in the form of a special case for the opinion of the Court (*u*). Questions of law arising.

Where a matter is referred to two arbitrators, it is usual to provide in the submission that if the arbitrators shall not agree upon their award before a time therein specified, the matter shall be referred to an umpire who is either named in the submission or else power is given to the arbitrators to appoint one. In this latter case the umpire should be appointed at the time and in the mode directed by the submission, but unless there is anything therein to the contrary, the arbitrators may appoint the umpire at any time before or after the time limited for them to make their award, provided it be before the time limited for the umpire to make his umpirage, and they may in general do so even before they have themselves entered upon an examination of the matters referred to them. Where the reference is to two arbitrators and the terms of the document authorizing it do not shew that it was intended there should not be an umpire, or provide otherwise for the appointment Appointment of umpire, &c.

(*t*) Arch. Pr. 13th ed. pp. 1324-1334.

(*u*) 17 & 18 Vict. c. 125, s. 5.

of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, unless they be called upon by notice as aforesaid to make the appointment sooner. In general, the umpire should examine the witnesses himself, but by agreement of the parties he may receive the evidence from the arbitrators (x).

Costs of
arbitration

The arbitrator's power over the costs of the reference depends entirely upon the terms of the submission; if by the submission the costs are to abide the event, then the arbitrator has no power over them (y).

Making and
publishing
award.

The award is signed by the arbitrators, and usually in the presence of a witness; when made it is duly stamped and notice is given by the arbitrators to the parties or their solicitors that it is ready for delivery, and that each of them may have his part on the day therein specified on payment of expenses. The award is only strictly deemed published from the time of such notice, but so far as to determine the arbitrator's authority and render him *functus officio*, an award is deemed published from the time of execution (z).

Grounds for
setting aside
award.

An award is liable to be set aside on various grounds, *e.g.*, misconduct of the arbitrator; the award not pursuing the submission; that the arbitrator has exceeded his authority; that the arbitrator has not dealt with all the matters referred to him; that the award is uncertain; or that the award is inconsistent. Many objections, however, which otherwise would be fatal to the award may be waived by proceeding with the reference with a knowledge of the same or the like, but the evidence of waiver ought to be clear (a).

(x) Arch. Pr. 13th ed. pp. 1332, 1333.

(y) Ibid. p. 1346.

(z) Ibid. 1352.

(a) Ibid. 1357.

With regard to the time within which an application to set aside an award must be made, where a verdict is taken at the trial and *the action only* is referred, and the arbitrator is put merely in the place of a jury, the motion should in ordinary cases be made within the time limited for a motion for a new trial (b). Where an action and *all matters in difference* are referred at the trial, or where the reference is made by rule or order not at the trial, an application to set aside an award should be made before the last day of what before the Judicature Acts was the next term after the publication of the same (c).

Time for moving to set aside award.

If the submission to arbitration is not by rule or order, and it is desired to set the award aside, the first step towards doing so is to make the submission a rule of Court, for the Court has no jurisdiction in respect of it until this is done. It is made a rule of Court in this way:—An affidavit is made of the due execution of the submission and also verifying any enlargements of the time for making the award. No actual motion is made, all that is necessary for the purpose being a side-bar rule (d), that is to say, counsel's signature is obtained to a motion paper indorsed to make the submission a rule of Court. This, with the appointment, submission, &c., is taken to the proper office and the rule is then at once drawn up (e). This preliminary step being taken, the course then is to file an affidavit or affidavits shewing the grounds for moving to set aside the award, and on the evidence counsel moves *ex parte*, obtaining, if so far successful, a rule *nisi*. This is drawn up and served, and the other party can file an affidavit or affidavits in opposition. Affidavits in reply to these are only allowed by leave of

Mode of proceeding to set aside award.

(b) As to which see ante, pp. 99, 100.

(c) Arch. Pr. 13th ed. p. 1358.

(d) As to which see ante, p. 69.

(e) Arch. Pr. 13th ed. pp. 1318.

the Court. The rule then comes on in due course to be argued, and is either made absolute or discharged, as the case may be (*f*).

Enforcing
award.

Where the submission is by or has been made a rule of Court, or is by Judge's order, the performance of the award may be enforced by execution. In such cases a copy of the rule making the submission a rule of Court, of the allocatur for costs, if one, and of the award, must be served together with a written demand for performance of the award. If not performed, an application is made by summons, supported by affidavit verifying award and service, for leave to issue execution (*g*). Where the submission cannot be made a rule of Court, the only means of enforcing the award is by action (*h*).

(*f*) Arch. Pr. 13th ed. p. 1360 *et seq.*

(*g*) Order XLII. rr. 5, 7, 20. Arch. 13th ed. p. 1367.

(*h*) Arch. Pr. 13th ed. p. 1365.

PART III.

OF THE PRACTICE AS SPECIALLY OCCURRING IN THE CHANCERY DIVISION.

INTRODUCTORY.

BEFORE commencing this Part of the work, the student must be reminded of what has already been noticed (*a*), viz., that a great object of the new practice was to assimilate the two previous practices of Law and Equity as far as possible. This it was impossible to do altogether, because of the different kinds of cases coming under the cognisance of the Queen's Bench, Common Pleas, and Exchequer Divisions (*b*), on the one hand, and the Chancery Division on the other hand; and had there been no such difference, there would have been no necessity for the marking out of the Court into Divisions (*c*). But as far as possible—that is to say, in all those proceedings which are necessary to be taken equally in all the Divisions—the steps are the same; and therefore in the present part of this work, wherever this is so, and the matter has already been dealt with in Part II., passing reference is only made, without going again into explanation, as that would be mere useless repetition. On all such points, therefore, if the student has not become thoroughly conversant with them from his perusal of Part II., he must refer back, and, as far as possible, references will be found given throughout to the prior pages in which the subject is dealt with.

(*a*) Ante, pp. 6, 7.

(*b*) Now one Division, "The Queen's Bench Division," see ante, pp. 13, 14.

(*c*) Indeed it was not necessary to mark out the Queen's Bench, Common Pleas, and Exchequer Divisions separately, but they might have been at first summed up as one Division, as they in fact now are: see note (*b*), supra.

CHAPTER I.

PROCEEDINGS TO THE FIRST HEARING AND JUDGMENT.

Commencing
proceedings.

PROCEEDINGS are usually commenced by action, the first step in which is the writ of summons (*d*), but there are, in addition, certain special ways in which in some cases proceedings may be commenced, viz., by petition, motion, and summons (*e*). These are however dealt with subsequently in Chapter V. of this Part (*f*). The writ of summons must be marked with the name of one of the Judges of the Division, to whose Court and Chambers it is thereafter attached, unless transferred (*g*).

Appearance.

Service having been effected, the next step is the appearance of the defendant (*h*).

Effect of non-
appearance.

The course to be pursued in the event of the non-appearance of the defendant to the writ is usually utterly different to that in the Queen's Bench Division dealt with in Part II. (*i*), though of course there may be cases in which it is not so ; that is to say, in which the action is of such a kind that it could properly have been assigned to the Queen's Bench Division, had the plaintiff so chosen. It follows naturally that the

(*d*) Ante, p. 37.

(*e*) And until the Rule of April, 1880, also special case under 13 & 14 Vict. c. 35.

(*f*) Post, p. 160.

(*g*) Order V. r. 4. A cause is often transferred from one Judge to another on account of there being an excess of cases before the former.

(*h*) Ante, p. 43.

(*i*) See ante, pp. 48-51.

practice should here be different, for the plaintiff is usually suing for something going far beyond a mere judgment by default, *e.g.*, he may be seeking administration of some estate with special inquiries, the propriety of which the Court must consider.

The effect, then, of non-appearance to the writ is this, viz., that upon the plaintiff filing a proper affidavit of service, the action proceeds in the same way as if the defendant had appeared (*k*); that is to say, that the plaintiff will go to a hearing, proceed afterwards in Chambers, and then to conclusion, as hereafter detailed, in just the same manner as if the defendant was before the Court, except that the truth of his statements are taken to be admitted. Any pleading is in the case of non-appearance filed in the Master's office (*l*), or in the district registry, as the case may be (*m*).

After appearance the pleadings then take place as Pleadings. in an action in the Queen's Bench Division (*n*); and here the only point necessary to specially notice is the effect of the defendant making default in delivering his statement of defence. In the same way that the effect of non-appearance is different, as just stated, so the effect of this default in pleading is entirely different from what it would be in the Queen's Bench Division, and for the same reasons. The result here is this, viz., that the plaintiff may set down the action on motion for judgment so as to have the cause heard in the same way as if no default had been made. If there are several defendants, and one only makes default, the plaintiff may either set down the action at once against him, or wait till it is entered

(*k*) Order XIII. r. 9.

(*l*) Formerly called the Record and Writ Clerks' office, but see now 42 & 43 Vict. c. 78.

(*m*) Order XIX. rr. 6, 29.

(*n*) See ante, Part II. Chap. III.

for trial, or set down on motion for judgment against the other defendants (*o*).

Motion for judgment.

The subject of proceeding by means of motion for judgment has been already referred to in Part II., as far as was there necessary (*p*). It demands some few further remarks here specially applicable to Chancery Procedure. A motion for judgment is not treated as an ordinary motion (*q*), but it is set down in the Cause Book in the same way as if notice of trial had been given. The notice should be served two clear days at least before the day named in it as the day when the motion will be made and the notice must be given before it can be entered for hearing.

Notice of trial, &c.

Assuming that the plaintiff does not proceed by motion for judgment and that issue is joined, notice of trial is then given, and the cause is entered for trial and duly comes on to be heard (*r*). As to the different modes of trial, the student is referred to Part II. Chapter V. (*s*); but a trial of Chancery cases by a jury does not very often occur, for the reason that the matters coming within this Division are, for the main part, matters much more easily dealt with by a Judge than by a jury. Still primarily the same right exists to a jury as has been already detailed in Part II., and where there is to be a jury, the course is now not for the trial to take place before the Chancery Judge, for such a course is inconvenient as tending to block up the Court and prevent the regular routine of business, but such actions are tried in the county or place named in the statement of claim, or if no place is named they are placed in the list of actions for trial in the county

Mode of disposal of jury cases.

(*o*) Order xxix. rr. 10, 11.

(*p*) Ante, pp. 97, 98.

(*q*) As to which see post, pp. 141, 142.

(*r*) See ante, pp. 89, 90.

(*s*) Ante, p. 88.

of Middlesex in exactly the same way as in the Queen's Bench Division (*t*)

Notwithstanding the primary right to a jury which the parties both have, the Court or a Judge may, if it appears desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the Judicature Acts could, without any consent of parties, be tried without a jury (*u*). This rule practically covers every ordinary cause entered in the Chancery Division (*v*), but though there is the power thus given, it will only be exercised in cases where trial by jury would be obviously cumbrous and inconvenient, *as*, where the point in dispute is to be collected from a mass of correspondence (*w*). Direction for trial without a jury.

The evidence at the hearing in this Division is frequently taken by affidavit. The general rule as to evidence is certainly that in the absence of agreement between the parties it is to be *viva voce* unless otherwise ordered (*y*), but very often the parties agree that the evidence shall be by affidavit, according to the old practice in Chancery, and as the more convenient course. Evidence.

The procedure when the parties have consented to the evidence at the hearing being by affidavit is as follows: Procedure on agreement to take evidence by affidavit.
—Within fourteen days after the consent, or within such time as the parties may agree upon or a Judge in Chambers may allow, the plaintiff files his affidavits and delivers to the defendant or his solicitor a list thereof; the defendant has then fourteen days after

(*t*) See Registrar's notice of February, 1877, set out in Griffith and Loveland's Pr. pp. 364, 365; *Warner v. Murdock*, L. R. 4 Ch. 750; 46 L. J. Ch. 121.

(*u*) Order XXXVI r. 26. See also ante, p. 89.

(*v*) Griffith and Loveland's Pr. p. 376.

(*w*) See Haynes' Chancery Pr. pp. 133, 134.

(*y*) Order XXXVII. r. 1. See ante, pp. 91-93.

delivery of such list, or such time as the parties may agree upon or a Judge in Chambers may allow, within which he files his affidavits in answer, and delivers a like list thereof to the plaintiff or his solicitor; and the plaintiff then, within seven days after the expiration of the last mentioned fourteen days, or such other time as aforesaid, files affidavits in reply (if any), and delivers a list thereof to the defendant or his solicitor, and these last-mentioned affidavits must be confined to matters strictly in reply (*z*). When the evidence is thus taken by affidavit, such evidence must be printed, and the notice of trial is given at such time or times after the close of the evidence as in other cases is provided after the close of the pleadings (*a*).

**Affidavits
generally.**

Affidavits may be said to consist of four parts, viz., (1) the title, consisting of the heading in the Court, the reference number, and the names of the parties; (2) the name and description of the deponent; (3) the body or contents; and (4) the jurat, that is, a statement of the place where and the date when, and before whom sworn. Affidavits are made in the first person, divided into paragraphs, numbered consecutively, and each paragraph relating, as far as may be, to a distinct subject-matter, and they must be written or printed bookwise (*b*). They must state the description and true place of abode of the deponent, and must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory applications, when statements as to his belief, with the grounds thereof, may be admitted. The cost of every affidavit which unnecessarily sets forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall be paid by the party filing the same (*c*).

(*z*) Order xxxviii. rr. 1-3.

(*a*) Ibid. r. 6, ante, p. 88.

(*b*) Daniel's Ch. Pr. pp. 788, 789. Rule 12 of April, 1880.

(*c*) Order xxxvii. r. 3. See generally as to affidavits, Rules 12-18 of April, 1880.

The witnesses who have made affidavits are liable to be cross-examined thereon. The course is this: within fourteen days after the expiration of the time limited for filing affidavits in reply notice may be given by either party to his opponent to produce any deponent at the trial for cross-examination, and if not produced his affidavit cannot be used as evidence without special leave, and the party requiring such production is not obliged in the first instance to pay the expenses of the witness attending at the trial. The party to whom the notice is given is usually able to arrange with his witness to attend at the trial, but he is entitled also to compel his attendance in the same way as he might compel the attendance of a witness to be examined, that is to say, by subpoena (*d*) in the ordinary way (*e*). Cross-examination on affidavits.

To return—notice of trial having been given, the cause set down, and the briefs prepared and delivered, the action in due course comes on to be heard. At the hearing the leading counsel for the plaintiff usually opens and goes into the case, and is followed by his junior, then in like manner the respective senior and junior counsel for the defendant are heard, plaintiff's leading counsel replies, and the Judge then proceeds to give the judgment (*f*). This judgment, in most cases, does not dispose of the action altogether, but directs certain accounts and inquiries to be taken and made, which are proceeded with as hereafter explained (*g*), and the action is afterwards ultimately disposed of in the way also hereafter detailed (*h*). The hearing

The judgment pronounced by the Court has now to be drawn up in writing. The procedure to do this is as follows: Drawing up of judgment.

(*d*) As to which see ante, p. 92.

(*e*) Order xxxviii. rr. 4, 5.

(*f*) See also hereon ante, pp. 94, 95.

(*g*) Post, Ch. II.

(*h*) Post, Ch. IV.

follows :—The solicitor having the carriage or management of the proceedings (usually the plaintiff's solicitor) leaves his counsel's brief and any other necessary papers with the Registrar (*i*) who is that day attending in the particular Court. The Registrar prepares a draft of the proper order, and the plaintiff's solicitor gives notice to the other parties of an appointment before him to settle it. The solicitors of the other parties procure from the Registrar's clerk copies of the draft order, and attend the appointment in the Registrar's Chambers, produce their counsel's briefs, and any other necessary papers, and the Registrar then, in their presence, settles the judgment. If any party is not satisfied that it carries out the true order of the Court, he can bring it before the Court on a motion to vary the minutes. After it is finally settled it is engrossed, and notice of a further appointment given to pass it, which is usually a merely formal appointment, at which the different solicitors examine the engrossment of the judgment, and see there are no inaccuracies in it, and approve it. If any dispute, however, should arise, recourse may be again had to the Registrar. The judgment being passed, it is stamped and copied, or, as it is called, 'entered,' in the proper book kept for the purpose, and sealed with the seal of the Court and delivered to the solicitor having the carriage of the proceedings. Orders which are to be acted upon by the Chancery Paymaster require to be printed.

Printing
orders.

Friendly
actions.

We have now so far gone through the details of an ordinary contested action in this Division, taking it that it is a contested action; but many actions here are of a friendly nature, being more of an administrative than of a contentious character, or although there may at some subsequent period be contention, yet not up to this stage. For instance, in an administration suit by a residuary legatee under a will he is, as a matter

(i) As to this officer, see ante, p. 22.

of course, entitled as against the executor to a judgment directing the usual accounts and inquiries, and there is nothing therefore for the defendant the executor to oppose at this stage, although subsequently in Chambers there may be many contentious points; and there may also be points in dispute at the final hearing. In such cases as this, and provided also that the case involves no question of difficulty, and is not likely to take up much time in argument, a speedy method of getting a judgment exists, viz., by having the cause heard as a short cause, which we must now proceed to notice.

Although the cause is intended to be heard in this way, *Short cause.* all the pleadings *may* be gone through as usual; but this should not be so, for if the action is of this character there is no occasion for them. Where there are no pleadings, notice of trial, strictly speaking, cannot be given, for it is under the rules only to be given after the pleadings are closed (*k*). The proper course is in such cases for the plaintiff to give notice of motion for judgment (*l*). If, however, for some reason the pleadings are delivered, then the plaintiff can proceed either by ordinary notice of trial or by notice of motion for judgment. Whichever course is adopted, the practice then is for the plaintiff's solicitor to prepare minutes of what judgment he proposes the Court shall be asked to pronounce, and submit them to the defendant's solicitor. These minutes being agreed upon between them, the plaintiff's solicitor gets from his junior counsel a certificate that the cause is one fit to be heard short (*m*), and if the cause is set down on notice of trial, also a consent from the defendant's solicitor to its being so heard, and to the evidence (if any) being by affidavit. There is usually in such cases no evidence necessary. If the

(*k*) Griffith and Loveland's Pr. p. 390.

(*l*) As to which see ante p. 124.

(*m*) It is usually considered that the cause should be one which on an average will not occupy more than about ten minutes of the Court's time.

cause is set down on motion for judgment, no consent from the other side to its being heard 'short' is necessary, all that is required being the certificate of counsel; and if the notice of motion for judgment states that it is intended to mark the cause 'short,' no further notice of its being so marked is necessary (*n*). The cause being down to be heard and marked 'short,' it comes on very speedily, being usually placed in the paper on the first possible short cause day, there being a special day appropriated by each Judge in every week for the hearing of short causes (*o*), and judgment is thus obtained in a very short space of time, where, but for this special mode of procedure, months might possibly have elapsed. The judgment being pronounced, it is drawn up as before mentioned (*p*).

The judgment being thus in existence, whether from an ordinary hearing or from a hearing as a short cause, the next subject to be considered is that of the proceedings thereunder in Chambers, which is done in the next chapter.

(*n*) Griffith and Loveland's Pr. p. 390.

(*o*) Before a short cause comes on to be heard certain necessary papers should be left with the Judge's secretary, viz., a set of the pleadings, if any, and if not, a copy of the writ, and also two copies of the proposed minute of judgment.

(*p*) Ante, pp. 127, 128.

CHAPTER II. (g).

PROCEEDINGS IN CHAMBERS UNDER THE JUDGMENT.

THE first step is for the plaintiff's solicitor to make a copy of the judgment in the action, and to certify at the end thereof that it is a true copy. He then carries the same into the Judge's Chambers, and takes out a summons to proceed thereon, and serves the same upon the other solicitor or solicitors in the action.

At the return of the summons the solicitors attend before the Judge's Chief Clerk (r), who gives directions as to the manner in which and by whom each of the accounts and inquiries is to be prosecuted, the evidence to be adduced in support thereof, the time within which each proceeding is to be taken, and generally all necessary directions, and appoints a day for further attendance before him. To properly understand these proceedings in Chambers, however, it will be best to take as an instance one particular kind of action and follow it throughout, say an ordinary administration action against an executor or administrator (s). In noticing the main points in this one instance, the student must bear in mind that although it is but an instance, it shews the general details of the working out of a judgment in Chambers in any case, the only

(g) On the subject of this chapter generally, and on any points occurring in it as to which no reference is given, and on which the student is desirous of further information, he is referred to Daniel's Ch. Pr. ch. xxix. pp. 1039-1227. Haynes' Chancery Pr. pp. 391-448.

(r) As to this officer, see ante, p. 21.

(s) In the Appendix, post, p. 202, is given a form of an administration judgment or order containing the most usual accounts and inquiries in an ordinary administration action.

distinction being that different kinds of cases involve different accounts and inquiries, and to particularize individual cases is beyond the scope and object of the present work. If the student understands one case thoroughly that is sufficient, for the general practice is always the same.

Instance of an administration action.	To take, then, the instance of an ordinary administration action just mentioned. At the return of the summons to proceed, the Chief Clerk directs the plaintiff's solicitor to insert an advertisement in certain newspapers for creditors to come in and prove their claims. This advertisement is always directed to be inserted in the <i>London Gazette</i> , and usually in <i>The Times</i> and other chief London morning daily newspapers, or one of them, and if a country case, also in two local papers (t).
Advertisement for creditors.	
Inquiry as to pedigree.	If there is any question of pedigree involved, the Chief Clerk directs the plaintiff's solicitor to bring in evidence thereon by a certain day, and he also directs the accounts of the defendants, the personal representatives, to be brought in duly verified by affidavit, and any other necessary facts to be proved by affidavit by a certain day.
Accounts.	
Carrying out Chief Clerk's directions.	The next thing is for the respective solicitors to proceed to carry out the directions given by the Chief Clerk, so as to be ready to proceed at the appointment which has been given for the further attendance before him. The plaintiff's solicitor prepares the advertisement for creditors to come in and prove their claims, which is signed by the Chief Clerk and then inserted in the various papers as directed. This advertisement usually requires all claims to be sent in by a certain day to the solicitor for the defendants, the per-
Preparing and inserting advertisement.	

(t) Where the personal representative has already issued advertisements under 22 & 23 Vict. c. 35, s. 29, no further advertisements are generally directed to be issued. Daniel's Ch. Pr. p. 1094.

sonal representatives, and it also names a day for all claimants to appear before the Chief Clerk, which is called an appointment to adjudicate on claims, but at it no creditor need make any affidavit, or attend in support of his claim (except to produce his security), unless he is served with a notice requiring him to do so (*u*), but an affidavit is made by the personal representative or his solicitor, or both, stating what claims have been sent in, and which it is considered should be admitted and which not, and the reasons for this; and then, if necessary, directions may be given for any claimants to prove their debts strictly, and the appointment to adjudicate on claims may be adjourned for this purpose. If no claims have been sent in under the advertisement, an affidavit of no claims is made.

Appointment
to adjudicate
on claims.

Affidavit of no
claims.

In any cause for the administration of the estate of a deceased person, no party to the cause other than the executor or administrator is now, unless by leave of the Judge, entitled to appear either in Court or in Chambers on the claim of any person not a party to the cause, against the estate of the deceased in respect of any debt or liability. The Judge may direct any other party to the cause to appear either in addition to or in the place of the executor or administrator upon such terms as to costs or otherwise as he shall think fit (*x*).

Attendance on
claim.

If, as suggested in our instance, there is any point as to pedigree, an affidavit is made by the plaintiff, or some person conversant with the facts, proving any marriages, births, and deaths necessary under the circumstances to be proved. The affidavit should have exhibited to it the certificates of the respective marriages, births, and deaths; and in addition to this, for the sake of convenience, it is usual to prepare and carry into Chambers a pedigree which shews at a glance the

Pedigree.

(*u*) Daniel's Ch. Pr. p. 1094.
(*x*) Rule 8 of April, 1880.

position as proved by the affidavits. At the adjourned appointment before the Chief Clerk, the affidavits, &c., are considered, and what is proved duly noted down by him. It may be that he is satisfied that the evidence adduced properly answers the inquiry, or it may be that he directs some further evidence to be obtained, in which case the appointment is then adjourned, and so on, from time to time, until he is satisfied.

Affidavit
by personal
representative
on accounts
and inquiries.

Then as to accounts—these are duly prepared by the solicitor of the personal representative, and exhibited to an affidavit by the personal representative verifying them; and in addition, the affidavit, to satisfy several other requirements of the judgment, ordinarily states the amount of the deceased's funeral expenses, and gives in a schedule a statement of what his estate consisted at the time of his decease, and of what it consists at that time. This affidavit and the accounts are laid before the Chief Clerk at the appointment which has been given before him; the affidavit at once answers any inquiry in the judgment of what the funeral expenses amounted to, of what the estate consisted at the deceased's death, and of what it consists then; and the Chief Clerk having seen that the affidavit and accounts are in proper form, refers the latter to one of his junior clerks for the purpose of the items therein being vouched.

Vouching
accounts.

The plaintiff's solicitor then obtains an appointment before the junior clerk to vouch the accounts. At the day appointed the solicitors attend, and the solicitor for the personal representative proceeds to vouch by producing all necessary vouchers, such as receipts, &c. Where any item of payment is under forty shillings, no voucher is generally required, the oath of the accounting party being considered sufficient (y).

Any party who is dissatisfied with the accounts may enter into evidence to shew that certain moneys have been received which are not accounted for, which is called surcharging; or that certain items of payment are wrongly inserted, which is called falsifying. The junior clerk at the appointment, or any adjournment thereof, vouches the accounts as far as he is able; and if there are then any items not properly vouched or the propriety of which is objected to, he queries the same for the Chief Clerk. Surcharging and falsifying.

On any such queries an appointment is obtained before the Chief Clerk, and he considers the same and disposes of them. Queries on accounts.

Taking it, then, that the accounts are disposed of and all inquiries directed by the judgment duly answered, the next step is the preparation of the Chief Clerk's certificate, which is a document whereby the Chief Clerk specifically states or certifies to the Court the result of the accounts and inquiries that have been referred to him. The Chief Clerk being satisfied that everything necessary has been done, adjourns the proceedings for the certificate. The plaintiff's solicitor then leaves with one of the junior clerks at Chambers, whose duty it is to prepare certificates, all necessary documents, such as office copies of affidavits, &c., and from these documents and the notes of the proceeding in Chambers this official prepares the draft certificate. Chief Clerk's certificate.
Adjourning for certificate.

The draft being prepared an appointment is obtained before the junior clerk to settle it. The solicitors then attend; it is gone carefully through, and any queries on it disposed of as far as possible, either at this appointment or any adjournment that may be necessary, and an appointment is then obtained before the Chief Clerk, who finally goes through it and disposes of any queries that may yet remain. It is then engrossed and Settling certificate.

Approval of
certificate by
Judge.

Summons for
opinion of
Judge on
certificate.

signed by him, and has next to be formally approved by the Judge, which formal approval usually takes place after four days from the signature of the Chief Clerk. Within these four days, any party who is dissatisfied with the certificate on any point, may take out a summons for the opinion of the Judge thereon (z). At the hearing of this summons the Judge may direct any alteration of the certificate, or may consider no alteration necessary, or may direct the same to be considered as an application to vary the certificate (presently mentioned) and treat it accordingly. The certificate is then signed by the Judge, and duly filed in the Court.

Application to
vary certi-
ficate.

When certi-
ficate binding.

But notwithstanding the certificate is thus approved and filed, there is yet a course open to a party dissatisfied in any respect with it, viz., to take out a summons or give a notice of motion to vary it (a), which must be done within eight days after the filing, and if the application is not made within that time, the certificate is binding on all parties, unless indeed by special leave it is opened, which will only be done on some very strong case being made out (b). On the return of the summons to vary, it is not dealt with in Chambers, but is adjourned into Court; and as the cause will now be usually about to come on for final hearing on further consideration it is generally adjourned to come on at the same time.

Notice of
judgment.

In some cases the Chief Clerk may have considered that it is necessary for certain persons not parties to the action, but yet interested therein, to be present, or have an opportunity of being present on the accounts and inquiries; *e.g.*, the administration action may be brought by one of several residuary legatees, and of

(z) See Daniel's Ch. Pr. pp. 1219, 1220.

(a) Daniel's Ch. Pr. p. 1222.

(b) Ibid. p. 1223.

course the others have also equal rights with him. This point should in fact form the first subject for the consideration of the Chief Clerk on the matter coming before him in Chambers, and in any such case he will direct such parties to be served with notice of the judgment. After they have been thus served, they are bound by the proceedings, just as much as if they had been parties to the action. If it is desired to serve notice of the judgment on an infant, or person of unsound mind not so found by inquisition, it is now served in the same manner as a writ of summons in an action (c).

Any person so served with notice of a judgment may obtain an order for liberty to attend the proceedings under the judgment. This order may be obtained upon petition as of course (d), but parties simply attending under such an order run the risk of getting no costs allowed them; to be secure in getting their costs out of the estate they should apply by summons for an order for liberty to attend the proceedings, or having obtained an order of course, they should get the chief clerk's direction who is to attend on the accounts and inquiries (e).

This concludes the ordinary proceedings in Chambers, and even at the risk of repetition it would seem well to again remind the student that this instance we have gone through should be sufficient to supply him with a general knowledge of the proceedings in Chambers in working out any accounts and inquiries directed by any judgment. The inquiries and accounts may all be different in their nature, but still the steps

(c) As to which see ante, p. 40. The above is by Rule 7 of April, 1880; formerly an order had to be obtained as to how service was to be effected, and a copy of such order had to be served at the same time as serving the notice.

(d) As to order of course see post, p. 143.

(e) *Sharp v. Lush*, 10 Ch. Div. 468.

Obtaining
order to attend
proceedings.

Conclusion of
ordinary pro-
ceedings in
Chambers.

are the same, the proceedings always concluding with the Chief Clerk's certificate.

Additional
accounts and
inquiries.

Where in the prosecution of a judgment or order it appears to the Judge that it would be expedient that further accounts should be taken or further inquiries made, he may order the same to be taken or made accordingly, or if desired by any party, may direct the same to be considered in open Court; but such accounts or inquiries must be auxiliary to and not at variance with the judgment pronounced by the Court. An application for such further accounts and inquiries is made by summons, which must be served on all parties and also on persons who have obtained leave to attend the proceedings, and the additional accounts and inquiries should be numbered consecutively in continuance of the numbers of the original accounts and inquiries directed (*g*).

Sales under
the Court.

Before concluding this chapter, it seems advisable to detail the proceedings in Chambers in the case of a sale under the Court, as this very often forms an important part of the working out of a judgment, as it may direct a sale of certain property (*h*).

Special points.

The peculiarities in a sale under the Court are mainly these:—The Chief Clerk first directs who is to have the conduct of the sale, and this will usually be the plaintiff's solicitor; he appoints the day of sale, and directs in what newspapers advertisements of the sale are to be inserted (the *Gazette* is always one of the papers); he refers the abstract of title to one of the conveyancing counsel of the Court (*i*), whose duty it is

(*g*) Haynes' Chancery Pr. p. 420.

(*h*) It has been considered best to notice this here, although it might have been treated of in Chap. III. as an interlocutory proceeding, as a sale may be directed by some interlocutory order. The proceedings however are in both cases identical, only if there is a separate order directing a sale a separate summons to proceed thereon must be issued first. When directed by a judgment the general summons to proceed will serve.

(*i*) As to these officers, see ante, p. 22.

to report on the title and prepare conditions of sale, which are then approved by the Chief Clerk; the Chief Clerk then appoints some person to be the auctioneer, on an affidavit of his fitness, and on his giving security (usually a bond with two sureties), and settles his remuneration; he then fixes the reserved biddings, being guided in so doing by the affidavit of a surveyor, and these reserved biddings are sealed up and delivered to the auctioneer, not to be opened until the time of the sale. After the sale the auctioneer makes an affidavit of the result of the sale, and from this the Chief Clerk makes his certificate thereof. The auctioneer pays the deposit received by him into Court, and the balance of the purchase-money is paid into Court by the purchaser under an order obtained by him at his own expense by a day named in the conditions of sale; after the payment in, the conveyance to the purchaser is executed and the matter completed. If any disputes arise on the form of the conveyance they may be disposed of in Chambers in the action (*k*).

Mode in which
purchase-
money dealt
with.

(*k*) Daniel's Ch. Pr. pp. 1148-1187

CHAPTER III.

INTERLOCUTORY PROCEEDINGS.

IN Part II., Chapter IV., under the same heading as this chapter, various interlocutory proceedings have been dealt with which are applicable not only to the Queen's Bench Division, but equally to the Chancery Division—such, for instance, as discovery. The interlocutory proceedings mentioned in the present chapter are those that would more usually only occur in the Chancery Division.

Petitions.

In the first place, it should be observed that every judgment directing accounts and inquiries always reserves liberty to the parties to apply in Chambers as they may be advised ; but besides this, interlocutory applications may be made before there is any judgment. Interlocutory applications are made either by petition, motion, or summons. A petition is a written application to the Court containing a statement of facts, and praying for a certain order, and every petition states at its foot the names of the persons on whom it is proposed to serve it, who are called the respondents. The petition is lodged with the secretary of the Master of the Rolls, and being thus presented, the secretary writes on it a direction for the parties to attend on the day appointed for its hearing, which is called the fiat, and a copy of the petition with this fiat thereon is served on the solicitors for the respective respondents two clear days before the day appointed for hearing. Counsel are then instructed and it comes on to be heard in due course, when the Court makes such order as may

be just (*l*). It is a rule that all unopposed petitions are heard prior to those which are opposed.

It does not always follow that because a party is served with a petition he is justified in incurring the expense of appearing by counsel at the hearing, for in many cases the respondents may be merely formal parties. It is specially provided that when a petition is served and notice is given to the party served that in case of his appearance in court his costs will be objected to, and accompanied by a tender of costs for perusing the same, the amount to be tendered shall be £2 2s. The party making such payment is allowed the same in his costs provided such payment was proper, but not otherwise. This is, however, without prejudice to the rights of either party to costs, or to object to costs where no such tender is made, or where the Court or Judge shall consider the party entitled notwithstanding such notice or tender to appear in Court. In any other case in which a solicitor of a party served necessarily or properly peruses any such petition without appearing thereon, he is allowed a fee of not exceeding £2 2s. (*m*).

A motion is an application made to the Court with any written statement. A notice of motion is served upon the other parties to the action two clear days at least before the day named for its hearing, and this notice states that on the day therein named counsel will apply to the Court for a certain order, the effect of which is shortly stated. Counsel are then instructed on both sides, and the motion is in due course made (*n*). A motion is sometimes made *ex parte*, that is, on the application of one party without service of notice on any other party; but this only occurs usually when the matter is of some very pressing nature. For

(*l*) Daniel's Ch. Pr. pp. 1451-1461.

(*m*) Order vi. r. 17 of Additional Rules of Court of August, 1875.

(*n*) Daniel's Ch. Pr. pp. 1437-1451.

Ex parte
motion.

instance, if an injunction is sought against some act, directly the writ is issued the plaintiff may apply *ex parte* for an interim injunction until he has time to serve the defendant with notice of motion. An *ex parte* injunction will only be granted on affidavits shewing some very pressing case. All *ex parte* injunctions are necessarily interim or interlocutory injunctions; in fact all injunctions granted otherwise than at the hearing of the cause are interlocutory in their nature, the perpetual injunction being granted at the hearing. However sometimes the parties agree to treat a motion for an interlocutory injunction as the hearing of the cause.

When application to be by petition and when by motion.

There does not appear to be any fixed rule when an application should be made by motion and when by petition, but it may be stated, as a general rule, that, when any long or intricate statement of facts is required, the application should be by petition, whilst in other cases a motion is sufficient (o).

Summons.

A summons is a written application made in the Judge's Chambers. The summons being prepared, it is taken to the Judge's Chambers, where a day for its hearing is filled in, and it is sealed and placed in the list. At its foot it is addressed to all necessary parties, and must be served on the respective solicitors two clear days before the day of hearing. It then comes on to be heard before the Chief Clerk in Chambers (p), when the solicitors appear before him and he deals with it. If any party is dissatisfied with the Chief Clerk's decision on the summons, the Chief Clerk adjourns it to the Judge, who attends in Chambers on certain days for the purpose of hearing such cases, and he then deals with it, or he may adjourn it into Court

(o) Daniel's Ch. Pr. p. 1434.

(p) It is the practice in some of the Judges' Chambers to have summonses of a less important character heard before one of the junior clerks.

to be there argued by counsel. Very many applications may equally be made by petition or summons, it being a point of discretion whether the matter is of sufficient importance for a petition, *e.g.*, applications for payment out of Court of money. Ordinary instances in which a summons would always be used would be applications for discovery and inspection, for better answers to interrogatories, for leave to amend pleadings (*q*).

Orders made on petitions, motions, or summonses have to be drawn up in the same way as already pointed out as to a judgment (*r*), except that in the case of an order on summons there are of course no briefs, nor has the Registrar been present. The Registrar is here furnished with the materials for drawing up the order from the Chief Clerk's indorsement on the back of the summons. Some orders also of an unimportant nature, such as orders for time, are drawn up in the Judge's Chambers without having recourse to a Registrar at all. Drawing up of orders.

For some things orders are granted as of course. These orders may be obtained by *ex parte* motion or petition of course, but the usual practice is by a petition, which is simply lodged with the secretary of the Master of the Rolls, and without any hearing the order is drawn up as asked. Instances of these orders of course are orders to tax solicitors' bills (*s*), orders for the appointment of guardians to infant defendants (*t*), or orders for a married woman having a separate interest, to defend separately from her husband (*u*). Orders of course.

Upon all interlocutory applications the evidence is

(*q*) As to the practice on summonses in the Common Law Division, see ante, p. 69.

(*r*) Ante, pp. 127, 128.

(*s*) Ante, p. 112.

(*t*) Ante, p. 33, 51.

(*u*) Ante, p. 33. As to orders of course, see Daniel's Ch. Pr. pp. 1436-1451.

Evidence on
interlocutory
applications.

by affidavit, which need not be confined to such facts as the witness is able of his own knowledge to prove, as is the case in affidavits at the hearing of the action (x), but statements as to the deponent's belief, with the grounds thereof, may be admitted. The Court or a Judge may, on the application of any party to an action, order the attendance for cross-examination of any person making any affidavit (y).

Interlocutory
accounts and
inquiries.

Although, as has been shewn (z), all necessary accounts and inquiries are ordered by the judgment, yet, for the sake of expedition, interlocutory accounts and inquiries may be directed, for the Court or a Judge may at any stage of the proceedings order any which appear necessary to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the action should proceed in the ordinary way (a). In addition, any party to an action may at any stage apply to the Court or a Judge for such order as he may upon any admissions of fact in the pleadings be entitled to, without waiting for the determination of any other question between the parties (b). Such an order is known as an anticipatory judgment.

Anticipatory
judgments.

Summons
under Order
xv.

A very important special provision is made by the Judicature Act, 1875, for the purpose of expediting proceedings in the nature of accounts in Chancery, viz., by an application under Order xv. This Order may be considered as analogous to Order xiv. in the Queen's Bench Division (c), for they both have as their design the prevention of delay. It provides that in default of appearance to a summons indorsed with a claim

(x) Ante, p. 126.

(y) Order XXXVII.

(z) Ante, p. 127.

(a) Order XXXIII.

(b) Order XL. r. 11; *Turquand v. Wilson*, 1 Ch. D. 85.

(c) As to which see ante, pp. 52, 53.

for an account, and after appearance unless the defendant by affidavit or otherwise satisfy the Court or a Judge that there is some preliminary question to be tried, an order for the account claimed with all directions usual in Chancery in similar cases shall be made. Any application for such an order is made by summons, and must be supported by an affidavit, filed on behalf of the plaintiff, stating concisely the grounds of his claim to the account. The application may be made at any time after the expiration of the defendant's time for appearing (*d*).

The importance of Order xv. cannot be overrated; and applications under it have become very common in Chancery practice, for practically by means of it in many cases everything that would be granted at the hearing of the cause may be obtained under it. Particularly where the account claimed is an executorship or administration account, the usual administration decree will be made and not merely an order for accounts (*e*).

Importance of
Order xv.

An application that is often made to the Court is for the appointment of a receiver. A receiver is some independent person appointed by the Court to receive the rents and profits of real or leasehold estate, or to get in and collect personal estate or other things in question pending the suit when it does not seem reasonable to the Court that either party should do so, or when a party is incompetent to do so (*f*). Any person who is appointed receiver has to give security, which is usually a recognizance with two sureties conditioned in double the amount of the outstanding property he has to get in, or double the amount of the annual rent he has to receive. The recognizance is made out to the Master of the Rolls and the senior Vice-Chancellor, and it has to be executed before a Commissioner to administer

Receiver.

(*d*) Order xv. rr. 1, 2.

(*e*) Haynes' Ch. Pr. p. 64.

(*f*) Daniel's Ch. Pr. p. 1563.

oaths. The practice to obtain the appointment of a receiver is to apply to the Court by motion, supported by affidavit of the fitness of the person proposed to be appointed; the recognizance is afterwards approved in Chambers. The duties of a receiver are to act according to what he is appointed for, and from time to time to pass his accounts (which are vouched in Chambers), and pay the balances into Court as directed by the order appointing him. When a receiver's duties are ended, the recognizance entered into on his appointment should be vacated (*g*).

Power of appointment of receiver under the Judicature Act, 1873.

By the Judicature Act, 1873, wider and more general powers of appointing receivers are given than formerly, it being provided that a receiver may be appointed in all cases in which it shall appear to the Court to be just or convenient that such order should be made (*h*). Formerly there were various cases when the Court would not appoint a receiver, in which under this provision it now will, *e.g.*, in the case of a person having a charge or mortgage on land, the Court would formerly only have appointed a receiver if the party had no legal title to secure him; thus a mortgagee could have no claim for one, for he could take possession under his mortgage. So wherever an annuitant had a legal charge on land on which he could have a distress no receiver could have been obtained (*i*). Now the powers given to the Court are general and discretionary.

Preservation of property.

Beyond the appointment of a receiver, an order may be made for the preservation or interim custody of any property the subject of a pending action, or for it to be brought into Court or otherwise secured; and if any property is of a perishable nature, or for other reasons it appears desirable, an order may be made for its sale (*k*).

(*g*) As to receivers generally, see Daniel's Ch. Pr. pp. 1563-1618.

(*h*) Jud. Act, 1873, s. 25 (8).

(*i*) Griffith and Loveland's Pr. p. 44.

(*k*) Order LII. rr. 1-3.

The Court has also, for the purpose of the preservation of property and for other purposes, a very wide power of granting injunctions, and this may be the direct object of the action, or it may be merely an interlocutory application. Both cases may, however, be dealt with in this place. This power of granting an injunction was always possessed by the Court of Chancery, and by the Common Law Procedure Act, 1854 (*l*), a like power was given in certain cases to the Courts of Common Law. Now under the Judicature Act, 1873 (*m*), very wide powers of granting injunction are given, it being provided that an injunction may be granted whenever just or convenient, and that if an injunction is asked either before or at or after the hearing of any cause or matter to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estate claimed by both or either of the parties is legal or equitable.

No writ of injunction is now issued. An injunction is by judgment or order, and any such judgment or order has the same effect which a writ of injunction previously had (*n*). The proper course to enforce an injunction is to serve a copy of the order granting it personally on the party, and if it is not obeyed the party is liable to attachment; but notwithstanding the order has not been served, if the injunction is brought to the party's knowledge, he is liable if he acts in opposition to it.

(*l*) 17 & 18 Vict. c. 125, s. 79.

(*m*) Sect. 25 (8).

(*n*) Rule 32 of April, 1880.

Ex parte
injunction.

In matters of a pressing nature a plaintiff may obtain an interlocutory injunction *ex parte*, but he must make out a strong case. The writ must be issued, though it need not be first served, and the course to take to obtain the *ex parte* injunction is to move the Court on an affidavit shewing the urgency of the case. The Court in granting an *ex parte* injunction puts the plaintiff on terms to abide by any order the Court may thereafter make as to damages, if it shall appear that the injunction ought not to have been granted (*o*).

Mandamus.

The Court has also full power in its discretion to grant a mandamus to compel the doing of any act whenever it shall appear just and convenient to do so (*p*).

Payment into
Court.

Applications for payment into Court are almost invariably made when a party has in his hands certain moneys, the subject of the action. For instance, if an executor or administrator in any pleading or affidavit admits that he has a certain sum in hand on account of the estate, the proper course is usually to at once take out a summons for payment of such sum into Court.

Mode of
payment in.

The payment into Court is effected by lodging the order (*q*) directing payment at the Chancery Pay office, where formal directions are given to the Bank of England to receive the money in accordance with the order. The directions are then taken to the Bank, and the money is paid in and duly carried to the credit of the action, or the credit of any particular account directed by the order, in the books of the Paymaster General.

Investment.

If the order does not direct an investment of the money, it is, unless a request is made that it should not be, placed on deposit at the Bank; but if an investment is directed, the order is, after the payment in, left at the Paymaster General's office and the investment bespoken.

(*o*) See as to Injunctions, Daniel's Ch. Pr. pp. 1462-1536.

(*p*) Jud. Act, 1873, sect. 25 (8).

(*q*) It has been before noticed that all orders to be acted on in the Chancery Pay office have to be printed, see ante, p. 128.

Money may also in certain cases be brought into Court voluntarily by a party without any order, upon the written request of the person so desirous of paying it into Court. Such a payment in on a request only cannot be made to a separate account, but simply to credit of the cause (r). Payment into Court without order.

If in the course of an action evidence is required by any party to it, of what money is in Court, a certificate of fund may be obtained from the Paymaster General's office without payment of any fee. A complete transcript of the account shewing the dealings with it from time to time, may also be obtained on leaving a proper book for the same to be copied into, and certain fee stamps. Certificate of fund or transcript of account.

If in any action brought to recover certain property the defendant sets up a lien thereon for a certain sum of money, the plaintiff may at once take out a summons to be at liberty to pay into Court, to abide the result of the action, the amount of such lien, and any further sum that may be directed for interest or costs, and that upon such payment in, the property may be given up to him (s). Application where defendant sets up a lien on property.

An application is sometimes made for a writ of *ne exeat regno*. This is a writ which issues to restrain a person from going out of the kingdom without the license of the Sovereign or of the Court (t). It was formerly in general issued only where the claim was of an equitable nature, *e.g.*, to prevent a trustee from going abroad. To take this instance, if a *cestui que trust* had reason to believe that his trustee, who had not accounted to him, was going abroad without ac-

(r) Chancery Funds Amended Orders, r. 4. As to payment of money out of Court see post, p. 156. See also generally on the subject of Proceedings in the Chancery Pay office, Haynes' Ch. Pr. pp. 562-584. See also post, pp. 156, 157.

(s) Order LII. r. 6.

(t) Daniel's Ch. Pr. p. 1548.

counting, he might issue a writ against him for an account, and then immediately apply to the Court *ex parte*, by motion, for this writ, which would be granted on due cause shewn by affidavits (*u*).

Important
limitation of
extent of writ
of *ne exeat*
regno.

It has, however, been recently held by the Master of the Rolls (*v*) that since the Judicature Acts, 1873 and 1875, the practice at Common Law and in Equity in respect of the arrest of a debtor on mesne process is assimilated, and that a writ of *ne exeat regno* in respect of an equitable debt will not be granted unless the applicant brings his case within the terms of the sixth section of the Debtors Act, 1869 (*w*).

Stop order.

In the course of an action in this Division money is frequently paid into Court to be dealt with by the Court in the action, and when persons have successive interests in it—*e.g.*, if the income of the fund is given to one for life, and then the *corpus* to some other person or persons—it usually remains in Court until the happening of this ultimate event. In such cases it often happens that a beneficiary charges or disposes of his interest to some person, and, if so, to perfect the charge or disposition in his favour, he should obtain a stop order. This is an order preventing any fund in Court being paid out or otherwise dealt with without notice to the applicant. If the party against whose interest the stop order is desired consents, the application for it may be by summons in Chambers, but if not it must be by petition to the Court. The application must be supported by evidence shewing the interest of the party against whom a stop order is sought, in the fund in Court, and verifying the security or interest that has been acquired by the applicant (*x*).

(*u*) Daniel's Ch. Pr. pp. 1548–1562.

(*v*) *Drover v. Beyer*, 49 L. J. (Ch.) 37.

(*w*) See as to this, ante, pp. 79, 80.

(*x*) Ibid. pp. 1543–1547. A *distringas*, and a restraining order, cannot be treated of in this chapter, as they are not interlocutory proceedings in an action. As to them see post, Chap. V. pp. 171–173.

If a plaintiff does not proceed with due diligence in prosecuting the accounts and inquiries in Chambers, or generally in bringing the action to a conclusion, an application may always be made by any party to take the conduct of the proceedings away from him, and give it to the applicant (y). Summons for conduct of cause.

If an action is instituted for the administration of an estate and the writ served upon the defendant the personal representative, and subsequently a like action is commenced by another person interested in the estate, it is evident that the defendant can by delaying the first plaintiff and assisting the second one, enable the latter to obtain judgment first. Formerly the rule was that the party who obtained judgment first would go on, and the other plaintiff, though he commenced his action first, would be shut out from the management and conduct of the matter. The practice is, however, now different, for in such a case the proper course is for the plaintiff in the first action on discovering the judgment in the second action, to take out a summons entitled in the two actions, asking that he may have liberty to attend proceedings under the judgment in the second action, that he may have the conduct of such proceedings given to him, and that the costs of his action may be costs in the second action. And such an order will usually be made (z). Course to be taken when two actions commenced for administration of any estate, and judgment first obtained in second action.

If any person who is a ward of Court is desirous of contracting marriage, an application for leave to marry must be made. The application is made by petition, stating (1), the age of the ward; (2), the nature and amount of his or her fortune; and (3), the contemplated marriage, and the age, rank, position, and fortune of the person to whom the infant is proposed to be married, and praying for an inquiry whether the mar- Application for leave for ward of Court to marry.

(y) Daniel's Ch. Fr. pp. 1082-1084.

(z) *Rhodes v. Barrett, Ex parte Singleton*, L. R. 12 Eq. 479.

riage is a proper one. The order made on the petition refers the matter to Chambers, where—the Chief Clerk being first satisfied of the fitness of the match—the settlements are considered, settled, and approved, and an order is ultimately made that on the execution of the settlements the parties be at liberty to marry (a).

(a) Daniel's Ch. Pr. pp. 1206–1214. As to a petition under 18 & 19 Vict. c. 43, see post, p. 166.

CHAPTER IV.

PROCEEDINGS TO CONCLUSION.

IN Chapter II. of this part, the proceedings in Chambers under the judgment were considered to their conclusion, that conclusion being the Chief Clerk's certificate (*b*). We have now to consider the proceedings subsequent to this to their close.

Every judgment directing accounts and inquiries to be taken and made, always reserves the further consideration of the action; for it is evident that after the accounts and inquiries have been proceeded upon before the Chief Clerk in Chambers, and he has made his certificate, the cause must again come before the Court to be finally disposed of, for the Chief Clerk's certificate only certifies a number of facts, and it is for the Court subsequently to act on these facts as found by the Chief Clerk. This being so, it is manifestly of great importance that the Chief Clerk should have accurately certified the facts; and that this should be so to the fullest extent, there exists the power of taking the opinion of the Judge on the certificate, or of applying to vary it, as has been already detailed (*c*). Further consideration always reserved.

The step to bring the action to a conclusion, is to set it down for final hearing, or, as it is called, for hearing on further consideration. The action cannot be thus set down until the expiration of eight days from the filing of the Chief Clerk's certificate, unless this time is waived by the other side. If it is not set down Cause set down on further consideration.

(*b*) Ante, p. 135.

(*c*) Ante, p. 136.

by the plaintiff or party having the conduct of the proceedings within fourteen days from the filing of the Chief Clerk's certificate, it may be set down by any other party. The mode of setting it down is to hand into the Registrar's clerk a written request signed by the solicitor setting it down, asking that it may be set down, and to produce to him the judgment or order which adjourned the further consideration, or an office copy thereof, and an office copy of the Chief Clerk's certificate. It is then set down, and notice thereof must be given to the other parties at least six days before the day for which the same is marked for hearing. The practice is in general the same as on the original hearing (*d*), but no further evidence than the certificate as to matters directly in issue in the cause will be received, but the Court will draw conclusions from statements in the certificate. Any matters not directly in issue may, if the Court thinks proper, be proved by affidavit (*e*). The party who has set the cause down must leave in Court with the Judge's secretary for the use of the Judge, a copy of the judgment or order which adjourned the further consideration, also of the Chief Clerk's certificate: and if minutes of the proposed order on further consideration have been prepared, two copies thereof should be left.

Hearing on further consideration as a short cause.

Drawing up, &c., of judgment.

An action may be heard on further consideration as a short cause under the same circumstances and in the same manner as has already been pointed out with regard to the original hearing, and no consent of the other parties is necessary to its being marked "short" (*f*). The judgment also, when pronounced, is drawn up, settled, and passed and entered, in a similar manner (*g*).

Judgment on further consideration.

The Court will, when possible, give a final judgment

(*d*) Ante, p. 127.

(*e*) Daniel's Ch. Pr. pp. 1228, 1229.

(*f*) Ante, p. 129.

(*g*) Ante, p. 128.

on this hearing on further consideration, declaring the rights of the parties, dealing with the whole property the subject of the action, and directing the taxation and payment of costs. In some cases, however, to at once finally dispose of the whole action is impossible, for there may be further matters necessary to be inquired into, and when this is so the action will be disposed of only as far as it can be up to that time; any further accounts and inquiries that appear necessary or advisable will be directed, and as to them the cause will stand in the same position as originally; that is to say, these further accounts and inquiries will have to be proceeded with in Chambers; a further Chief Clerk's certificate obtained; and there will be then another hearing on further consideration.

When cause cannot be finally disposed of.

And even although the action may not require any further accounts and inquiries, or any further actual hearing, yet in many cases it is necessary that the Court should retain control over persons and property, *e.g.*, where there are infants, wards of Court, or where there is a fund in Court on which the dividends have to be paid to certain persons, and ultimately the *corpus* to others. In all such cases as this, the judgment on further consideration reserves liberty to apply, so that on any point that may be necessary the parties may from time to time apply to the Court in the existing action.

Parties and property remaining under control of the Court.

The next thing to observe on is the enforcement and carrying out of the judgment. On further consideration, in some cases it may direct money to be paid by one of the parties, and the different modes of enforcing such a judgment as this have already been pointed out (*h*); in other cases it may direct some act to be done by one of the parties other than payment of money, and here again the modes of proceeding

Enforcement and carrying out of judgment.

(*h*) Ante, pp. 101-105.

have been pointed out (*i*), but the process of attachment for contempt of Court is, however, of more constant occurrence in this than in the Queen's Bench Division.

Attachment
for contempt
of Court.

An application for an attachment is made to the Court by motion, of which notice has been duly served. Personal service of such notice is not necessary; it is sufficient if served in the way ordinary notices and proceedings in an action are served (*j*). In support of the motion it must be shewn that the judgment or order directing the doing or non-doing of the act in respect of which the attachment is sought was served upon the person, or in some way brought to his knowledge, and that there has been a breach of it. Upon this contempt being shewn the party will, unless he can show some good excuse, be committed to prison. How long he remains there is a matter of discretion with the Court, but he is usually allowed to clear his contempt by doing, or undertaking to do, or not to do, the act in question, as the case may be, and paying the costs incurred by his disobedience. This is called purging or clearing his contempt.

Dealing with
money in
Court.

In some cases there may be money in Court which is dealt with by the judgment or order on further consideration. In such a case, if in cash it may simply be directed to be paid to the party or parties entitled, or if invested in stock the stock may be directed to be transferred to such party or parties, or it may be directed to be sold, and the proceeds of such sale so paid. When cash in Court is directed to be paid out, a cheque is obtained by simply leaving the judgment or order at the office of the Paymaster General and bespeaking it, and it will be usually ready after the lapse of two or three days. The party to receive the money then attends with his solicitor (who must previously have been identified at the Chancery Pay office), who identifies him as the person named in the judgment or order, and he

Identification
on receiving
money out of
Court.

(*i*) Ante, p. 104.

(*j*) *Browning v. Sabin*, 5 Ch. Div. 511; 46 L. J. Ch. 728. *In re a Solicitor*, 13 Ch. D. 152; 49 L. J. Ch. 295.

receives his cheque. Where stock is to be transferred or sold, directions to this effect are bespoken at the Registrar's office in the first instance, which is done by simply leaving the judgment or order there. The directions when obtained are taken, together with such judgment or order, to the Paymaster General's office, and the transfer or sale is effected, and in this latter case a cheque obtained as above detailed (*k*).

We have said that the judgment or order on further Costs. consideration usually deals with the question of costs. Sometimes by it the costs are directed to be paid by one of the parties, but in a very great number of cases they are ordered to be paid out of some fund in Court. The general subject of costs has already been considered (*l*), and it is not therefore necessary to add much here, but the student should be reminded that as there is not usually any issue tried by a jury in this Division, it is necessary for the Court to give a direction as to costs, and costs are in the discretion of the Court (*m*).

The proceedings to tax costs in this Division are of a Taxation. more formal and lengthy character than in the Queen's Bench Division (*n*), on account of the different class of cases involved—a reason which indeed accounts for nearly all differences in practice in the two Divisions—for, as a Chancery action generally necessarily lasts much longer than one in the Queen's Bench Division, and naturally the bills of costs therefore are usually much heavier, it is unfortunately impossible that they can be disposed of in the same summary way as they can be there (*o*).

(*k*) See generally as to proceedings in the Chancery Pay office, Haynes' Ch. Pr. pp. 562–584, also ante, p. 148.

(*l*) Ante, Part II. Chap. V. pp. 107–112.

(*m*) Order i.v., ante, p. 108.

(*n*) As to which, see ante, p. 111.

(*o*) The Author cannot, however, help observing that the time often—in fact usually—taken to tax solicitors' bills in the Chancery taxing offices is much to be regretted. He does not mean simply because solicitors are delayed in getting payment, but because thereby suitors are very often

Proceedings on taxation. The proceedings to taxation in the Chancery Division are as follows :—The plaintiff's solicitor certifies on the original judgment or order directing taxation that it has not already been referred to any Taxing Master, and leaves it with one of the Taxing Masters, who is called the Sitting Master of the day. He refers it to one of the Taxing Masters for taxation, and in any future taxation of costs in the same action no fresh reference is necessary, but it will take place before the same Master. The solicitor then leaves a copy of the judgment or order with the Taxing Master, and informs the different solicitors who he is. The solicitors then prepare and leave their costs, with all necessary vouchers, and on leaving them a memorandum of their being left, called a warrant on leaving, is issued and served on the other solicitors. All the bills to be taxed being left, the plaintiff's solicitor procures an appointment and issues a warrant to tax, being a memorandum containing a note of the appointment, and this is served on the other solicitors. The appointment is then attended, and the bills being taxed and completed, the Master gives his certificate of taxation, in which he certifies what is the amount of each party's costs. If these costs are ordered to be paid out of a fund in Court, the judgment and an office copy of the certificate of taxation are taken to the Paymaster General's office, and the cheques bespoken and received in the ordinary way.

Reviewing taxation. If any party is dissatisfied with the taxation of the costs he is entitled to bring the point before the Court or a Judge at Chambers. The course to obtain this

seriously delayed and injured. For instance, the costs of an action may be directed to be taxed and paid out of a fund in Court, and the *residue* paid to the party or parties entitled thereto. Of course this residue cannot be ascertained and paid until the costs are taxed, and the taxation sometimes takes months, as through pressure of business the Taxing Master to whom the taxation is referred may be unable to give any appointment to tax the bills for some considerable time. This state of things is no doubt only to be remedied by the appointment of additional Taxing Masters, and it is to be hoped the necessity of doing so will soon be fully recognised.

review of the taxation is to deliver to the other party interested therein, and carry in before the Taxing Master, objections in writing to the taxation before the Master signs his certificate or allocatur, and afterwards, when the certificate is filed, to take out a summons for an order to review (*p*)

It should be noticed that the County Courts have a general jurisdiction in matters of an equitable character, where the matter in dispute does not exceed £500 in value. They have, however, no jurisdiction to entertain an action for an injunction, though they may grant an injunction as incidental to other matters in which they have jurisdiction (*q*). There is no absolute rule that because the matter in dispute does not exceed £500 proceedings should be brought in the County Court. County Courts jurisdiction.

In the Chancery Division (subject to the discretion of the Court) the costs are generally taxed on what is known as the Higher scale, unless the subject-matter of the proceedings is under the value of £1000, when they are on the Lower scale. Where an injunction is the principal or primary relief sought, they are always on the Higher scale (*r*). Where in the Chancery Division the plaintiff's solicitor considers that the costs should be on the Lower scale, he should give a certificate to that effect in the first instance, which is duly sealed, and then on its production all necessary fee stamps are from time to time received, as on the Lower scale (*s*). Costs on Lower scale.

(*p*) Additional Rule of Court of August, 1875, Order vi. r. 30. See also Daniel's Ch. Pr. pp. 1317-1319.

(*q*) 28 & 29 Vict. c. 99; 30 & 31 Vict. c. 142, s. 9; 31 & 32 Vict. c. 40, s. 12. As to their jurisdiction in matters coming within the Queen's Bench Division, see ante, pp. 109, 110.

(*r*) See hereon, *Chapman v. Midland Railway Co.*, 49 L. J. Ch. 449.

(*s*) Order vi. Rules of Supreme Court as to costs, of August, 1875, see ante, p. 110.

CHAPTER V.

OF CERTAIN SPECIAL PROCEEDINGS.

It has been stated (*t*) that in some cases proceedings may be commenced by petition, motion, and summons (*u*). These require to be noticed, as also do one or two other special proceedings.

Petitions.

A petition, when dealing with it as an interlocutory proceeding, we defined as a written application to the Court containing a statement of facts and praying for a certain order (*v*). The same definition is equally applicable to a petition as a means of commencing proceedings, except that here it is specially allowed by the provisions of some statute.

A petition under the statutory jurisdiction of the Court is intituled or headed in the matter of the Act of Parliament under which the petition is presented, and also in the matter of the particular trust, or property, or person to which it relates (*w*). As has already been stated with regard to interlocutory petitions (*x*), the petition is lodged with the secretary of the Master of the Rolls. Every petition states at its foot the names of the persons on whom it is proposed to serve it, and they are called the respondents. The petition

(*t*) Ante, p. 122.

(*u*) And until the Rules of April, 1880, also by Special Case under 13 & 14 Vict. c. 35.

(*v*) Ante, p. 140.

(*w*) Daniel's Ch. Pr. p. 1452.

(*x*) Ante, p. 140.

being presented, the secretary writes the fiat (*y*) on it. The petition is not usually signed by counsel. If any parties to it are under disability, the same rules apply as in the case of parties to an action being under disability.

Service of the petition is effected by delivering to the person to be served a true copy of the petition with the foot-note and the fiat thereon, and at the same time shewing him the original (*z*). The rules generally as to service of a writ in an ordinary action (*a*) apply to service of a petition. At least two clear days must elapse between the service of the petition and the day appointed for its hearing; and generally the same rules apply as to the hearing and subsequent drawing up and perfecting of the order as have already been detailed in considering interlocutory petitions (*b*).

We will now proceed to notice some particular instances of proceedings commenced by petition under the Statutory Jurisdiction of the Court:

1. *Petitions under the Legacy Duty Act* (*c*).—Where any person who is an infant or beyond seas is entitled to any legacy or the residue of any personal estate chargeable with legacy duty, the executor or administrator may, after deducting the duty, pay or transfer the same into Court to the account of the person or persons for whose benefit the same is so paid or transferred. The money paid in is invested and the dividends accumulated. The person or persons entitled may obtain payment out of Court by an *ex parte* petition in a summary way on proper proof of identity; and if paid in on account of infancy, on proof also of having

(*y*) Ante, p. 140.

(*z*) Daniel's Ch. Pr. p. 1455.

(*a*) Ante, pp. 39, 40.

(*b*) Ante, pp. 140, 141. See particularly p. 141, as to costs on petitions.

(*c*) 36 Geo. 3, c. 52.

attained full age. The payment into Court under this Act of a legacy belonging to an infant does not constitute the infant a ward of Court (*d*).

The application may, instead of being by petition, be by *ex parte* motion, or if the sum paid or transferred into Court does not exceed £300 cash or £300 stock it may be by *ex parte* summons at Chambers.

Petitions under
Lands Clauses
Consolidation
Act, 1845.

2. *Petitions under the Lands Clauses Consolidation Act, 1845 (e).*—Prior to this Act every company authorized by Act of Parliament to acquire lands for undertakings or works of a public nature included in its special Act the powers and provisions which were necessary to enable the company to take such lands; but by this Act the usual provisions were consolidated therein, and were made applicable to all future undertakings authorized by statute, except so far as they might be varied or excepted by the special Act (*f*).

The special particular in which we require to notice this Act is in the case of land being taken, in which persons who are under some disability are interested. In such cases the value of the property is arrived at by two surveyors, one nominated by the promoters of the undertaking and the other by the other party, and if they differ, by a third surveyor appointed by two justices on the application of either party after notice to the other.

Dealing with
money.

The amount of the purchase-money being thus ascertained, it is paid into the Bank with the privity of the Paymaster General of the Court, and placed to a proper account there, and invested in consols until it can be applied to one of the following purposes, viz.:—
(1) the purchase or redemption of the land tax, or dis-

(*d*) Daniel's Ch. Pr. pp. 1911–1914.

(*e*) 8 & 9 Vict. c. 18, amended by 23 & 24 Vict. c. 106.

(*f*) Daniel's Ch. Pr. p. 1861.

charge of any debt or incumbrance affecting the land in respect of which the money has been paid, or affecting other land settled to the same uses or trusts; (2) in the purchase of other lands to be settled to the same uses or trusts; (3) if the money is in respect of any buildings, in removing or replacing such buildings, or substituting others in their stead; or (4) in payment to any person becoming absolutely entitled.

Petitions under this Act are frequent, for—the money being simply paid into Court as above mentioned,—at first, perhaps, a temporary investment may be required, then a permanent investment, and finally payment out of Court to the person absolutely entitled. To accomplish each of these objects, different petitions have to be presented, and the costs of all such petitions, if proper under the circumstances, fall upon the company.

Instances of petitions under this Act.

It should be mentioned that if the purchase-money does not amount to £200, instead of being paid into Court as just mentioned, it may be paid to two trustees to be nominated on behalf of the persons entitled in the manner pointed out by the Act, and if the money does not exceed £20 it may instead be paid to the husband, guardian, committee, or trustee of the person entitled to the rents and profits of the lands taken.

Course where purchase-money under £200 and £20 respectively.

3. *Petitions under the Trustee Relief Acts, 1847 and 1849 (g).*—The object of these Acts is to afford to persons standing in the position of trustees a means, in the event of disputes arising, as to who is entitled to trust funds held by them, of determining the point without running the risk they would necessarily do in paying the money over simply on their own judgment.

Trustee Relief Acts, 1847 and 1849.

The course to be taken under these Acts is for the trustee seeking relief to file an affidavit (which having

Payment into Court.

(g) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.

to be acted on the Chancery Pay office requires to be printed), giving his name and address, and an address for service, particulars of the trust funds, a short description of the trust, the names and descriptions of all persons interested to the best of his knowledge, and submitting to the jurisdiction of the Court. If it is deemed unnecessary to have the money invested in the meantime, the affidavit should also contain a statement to that effect, otherwise, on payment into Court, it will be invested. On production of an office copy of this affidavit, the money or stock may be paid or transferred into Court without any order for that purpose. If there are several trustees, the payment or transfer in may be made by the majority of them, and if any difficulty arises through the disagreement on the point of payment or transfer into Court, where there are several trustees the Court may order it to be done on the petition of the major part of the trustees. Any person who becomes by force of circumstances a trustee is a trustee within the meaning of these Acts, and may take advantage of their provisions, *e.g.*, a mortgagee who has sold under his power of sale, and has a balance in his hands after payment of his principal, interest, and costs.

Sect. 25 (6)
of Judicature
Act, 1873.

An extension of the circumstances under which the provisions of the Trustee Relief Act may be taken advantage of is made by sect. 25, sub-sect. 6, of the Judicature Act, 1873 (*h*). The sub-section referred to is that which provides that an absolute assignee of a *chose in action*, after giving notice of his assignment to the holder of the *chose*, may sue in his own name, and it concludes as follows:—"Provided always that if the debtor, trustee, or other person liable in respect of such debt or *chose in action* shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to

(*h*) 36 & 37 Vict. c. 66.

such debt or *chose in action*, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same; or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees."

The payment or transfer into Court having been made, notice is given by the trustee to the different persons mentioned in his affidavit. One or more of these persons then presents a petition setting forth the facts of the case, and giving an address for service, asking for the fund to be dealt with and disposed of as he contends it should be; this petition is served on the trustee and all persons interested, and supported by affidavit and in due course comes on to be heard, when the matter is disposed of.

Notice of payment or transfer into Court.

Petition.

It is usual for a trustee paying money into Court under these Acts to deduct therefrom, in the first instance, the costs of his so doing. He need not do so, however, and if he does not the Court will order payment of his costs, provided of course it is a reasonably proper case for payment into Court. If he has improperly taken advantage of the Act when he ought not to have done so, the Court can order him to pay the costs occasioned thereby (i).

Costs of trustee on payment in.

4. *Petitions under the Trustee Acts, 1850 and 1852 (k).* Under these Acts a petition may be presented for the appointment of new trustees, and for the vesting of any property in them, or simply for an order vesting any property in any person, called a vesting order. Any petition for the appointment of new trustees must be supported by evidence shewing the willingness of the intended new trustee to act, and of his fitness. The former point is proved by the verification of his

Trustee Acts, 1850 and 1852.

Vesting order.

(i) See hereon Daniel's Ch. Pr. pp. 1784-1797.

(k) 13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55, which are to be construed as one Act.

Stamp duty
or orders under
these Acts.

written consent, and the latter point by the evidence of some person acquainted with him. The affidavit of fitness must not be made by the solicitor of any of the parties. In addition to this, the nature of the trust, the persons interested in it, and the reasons of the application, have to be shewn by affidavit (*l*). Any order made under these Acts dealing with a legal estate is liable to the same stamp duty as would have been payable if the same matter had been by deed.

Infants
Marriage
Settlement
Act.

5. *Petitions under the Infants Marriage Settlement Act (m).*—Under this Act, on petition, a binding marriage settlement may be allowed by the Court, in the case of a male infant at the age of twenty years, and in the case of a female infant at the age of seventeen years. The statute does not extend to powers of appointment as to which it has been expressly declared that they shall not be executed by an infant, and in case of any appointment under a power, or any disentailing assurance executed by an infant under this Act, it only takes effect if he afterwards attains full age.

On the hearing of the petition the matter is referred to Chambers, the proceedings being much the same in detail as those which have already been given in the case of the marriage of an infant ward of Court (*n*). If the infant, however, is not a ward of Court, the Court is not bound to inquire into the propriety of the proposed marriage, but only into the propriety of the proposed settlement; however, what would be a proper settlement in any particular case must necessarily often lead to an inquiry of all the circumstances connected with the proposed marriage (*o*).

(*l*) Daniel's Ch. Pr. pp. 1798–1832.

(*m*) 18 & 19 Vict. c. 43.

(*n*) Ante, pp. 151, 152.

(*o*) Daniel's Ch. Pr. p. 1213.

6. *Petitions for the Opinion of the Court under Lord St. Leonards' Act (p).*—Under the provisions contained in this Act any trustee, executor, or administrator may apply for the opinion, advice, or direction of the Court on any question touching the management or administration of the trust property or the assets of the testator or intestate. The petition is served on all persons interested, and if the trustee, executor, or administrator acts upon the opinion, advice, or direction given, that exonerates him from further responsibility, unless he has been guilty of any fraud, wilful concealment, or misrepresentation in obtaining such opinion, advice, or direction. Petitions for opinion of Court.

Questions of construction cannot be decided by a petition under this provision; it is confined to matters of administration (q). A petition under this Act requires to be signed by counsel, which is not the case with ordinary petitions. The application, instead of being by petition, may be a summons in Chambers founded on a written statement of facts, which statement must be signed by counsel. Scope of such petitions.

7. *Petitions under the Leases and Sales of Settled Estates Act (r).*—Petitions may, under this Act, be presented for the purpose of getting a lease or sale of a settled estate which could not otherwise be leased or sold on account of its being in settlement. The student is referred to the Act itself. Petitions under Leases and Sales of Settled Estates Act.

8. *Petitions to wind up Companies under the Companies Acts, 1862 and 1867 (s).*—There are various grounds for presenting petitions praying that a company may be ordered to be wound up, viz.: (1.) That the company has specially resolved to wind up under the jurisdiction of Winding-up of companies.
Grounds for petition.

(p) 22 & 23 Vict. c. 35, s. 30, amended by 23 & 24 Vict. c. 38, s. 9.

(q) Daniel's Ch. Pr. p. 1943.

(r) 40 & 41 Vict. c. 18.

(s) 25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131

the Court; (2.) That it has not begun, or has suspended business for a year; (3.) That its members are reduced to less than seven; (4.) That it is unable to pay its debts; and (5.) It may be ordered to be wound up if it can be shewn to the Court that it is just and equitable that it should be wound up (*t*). The petition to wind up must be verified by affidavit and be advertised seven clear days before the hearing, once in the *London Gazette*, and if the company's registered office is within ten miles of Lincoln's Inn Hall, once in the London daily morning newspapers, or if not within this distance, then once in two local newspapers of the district. At the hearing of the petition, the necessary facts being proved and no satisfactory cause shewn to the contrary, the order to wind up is made. Any creditors or shareholders are entitled to appear on the hearing of the petition, and if the order to wind up is made, and they have supported the winding-up, they get their costs out of the company's assets; if the order is refused, then those creditors or shareholders who have opposed the winding-up of the company get their costs against the person or persons presenting the petition. Every separate shareholder or creditor who appears does not get a separate set of costs, but one set of costs only is allowed for shareholders, and one set of costs for creditors.

Proceedings
in Chambers
after order to
wind up.

The order to wind up having been made and duly drawn up, passed, and entered, it is carried into Chambers and an official liquidator is appointed by the Chief Clerk. His duties are to get in the company's assets and generally to act in bringing the administration thereof to a close (*u*). With regard to unpaid calls, he brings into Chambers two lists of persons who are liable thereon, who are called contributories. These lists are styled respectively the A. list and the B. list;

(*t*) 25 & 26 Vict. c. 89, s. 79; 30 & 31 Vict. c. 131, ss. 40, 41.

(*u*) See his powers detailed in 25 & 26 Vict. c. 89, s. 95.

the A. list containing the names of those shareholders who are members of the company at the date of the order to wind up, and the B. list containing the names of those who were not then members but who had not ceased to be members for one year prior to the date of the winding-up order, and to these latter recourse can be had if, after exhausting the liability of the former, there are still debts or liabilities of the company undischarged. The shareholders in the B. list are not, however, liable for debts of the company contracted after they ceased to be members (*x*).

The definition already given of a motion, when treating of it as an interlocutory proceeding, viz., an application made to the Court without any written statement (*y*),—is equally applicable to a motion as a means of commencing proceedings. However, such a motion is not of constant occurrence; an instance of it would occur in the enforcing of an agreement for the remuneration of a solicitor under the Solicitors' Remuneration Act, 1870 (*z*), and also in an application under the Legacy Duty Act (*a*). Motions.

A summons we have previously defined as a written application made in a Judge's Chambers (*b*), which definition is equally applicable to a summons as a mode of commencing proceedings. Summonses originating proceedings are issued in the usual way, except that in addition a duplicate must be filed at the Writ Department of the Master's office of the High Court of Justice, and a sealed copy of the summons must be served. This service must be made seven clear days before the day of the return of the summons. There Summonses.

(*x*) 25 & 26 Vict. c. 89, s. 38.

(*y*) See ante, p. 141.

(*z*) 33 & 34 Vict. c. 28, s. 8.

(*a*) See ante, p. 161.

(*b*) Ante, p. 142.

are two very important cases of summonses originating proceedings which we will now notice (c).

Administration
summons.

1. *Summonses for the Administration of the Estate of deceased Persons (d).*—An originating summons for this purpose may be issued by any person claiming to be interested either as creditor, legatee, or next of kin, against the executor or administrator for the administration of the personal estate of the deceased, or of any real estate devised to trustees in trust to sell. The summons is intituled in the matter of the deceased person, and between the applicant as plaintiff and the executor or administrator as defendant. The hearing takes place in Chambers, and on account of this the proceedings are usually less expensive and more expeditious than a regular action for the purpose. This mode of proceeding can only be had recourse to in simple cases, and provided there is no special or peculiar relief sought; thus an executor or administrator cannot be charged with wilful default on such a summons (e).

Stay of
action for
administration
after order
made on
summons.

If an action for administration is brought after an order has been made upon an administration summons, the action will be stayed unless further relief can be obtained in the action than upon the summons. The practice to be observed as to service of notice of the order and obtaining leave to attend the proceedings, and generally except as above mentioned, is the same as in an ordinary action (f).

General
proceedings.

These proceed-
ings compared

The student should observe that now, since the pro-

(c) As other cases of commencing proceedings by summons may be mentioned: A summons under the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93, s. 9), to determine questions of ownership of property under that Act, and a summons under the Vendors and Purchasers Act, 1874 (37 & 38 Vict. c. 78, s. 9) to obtain a decision on requisitions, on title, &c.

(d) 15 & 16 Vict. c. 86, s. 45.

(e) Daniel's Ch. Pr. pp. 1071-1076.

(f) Haynes' Ch. Pr. pp. 413, 414.

visions of Order xv. (*g*), this administration summons does not possess those special and exceptional advantages that it formerly did. Prior to Order xv. the only way in which the administration of an estate could be obtained in Chambers was by means of this summons, but now, as has been pointed out, the administration of an estate in Chambers can be obtained in an action commenced by writ of summons, by an application under Order xv. However, Order xv. has not rendered this course of proceeding in any way obsolete, though no doubt it is by reason of it not so frequently had recourse to as formerly.

2. *Summonses for Guardianship and Maintenance (h).* Guardianship and maintenance summons.
 —The object of such an application as this is to have a guardian appointed to some infant, and to obtain an allowance for the infant's support. The summons is intituled in the matter of the infant, and is disposed of in Chambers. In support of it, evidence must be given of the age of the infant; the nature and amount of his fortune and income; what relations he or she has; and the fitness of the proposed guardian (*i*). Of course when there is an existing suit, there is no necessity to have recourse to this special provision, but the application for guardianship and maintenance is made as an interlocutory step therein.

A writ of *distringas* was a writ issued for the purpose of restraining the transfer of some fund not in Court or the payment of the dividends thereon. The process of *distringas* still exists, but a writ is no longer issued as formerly (*k*). Any person claiming to be interested in any stock, which includes shares, securities, and money standing on the books of a company (which comprises the Bank of England and other public companies), may on filing an affidavit by himself or

(*g*) As to which, see ante, pp. 144, 145.

(*h*) 15 & 16 Vict. c. 80, s. 26.

(*i*) Daniel's Ch. Pr. pp. 1189–1206.

(*k*) Rule 21 of April, 1880.

his solicitor, deposing to the fact of such interest, with a notice stating what is intended and desired, and on procuring an office copy of the affidavit and duplicate of the filed notice authenticated by the seal of the Central office, serve the office copy and duplicate notice on the company, appending to the affidavit a note stating the person on whose behalf it is filed, and to what address notices (if any) to that person are to be sent. The effect of this service is for five years exactly, the same as the effect formerly of a writ of distringas, viz., not absolutely to prevent any dealing with the stock in question, but that on any application being made to deal with it, notice is given to the person on whose behalf the affidavit was filed. Beyond the period of five years also, the original notice may be kept on foot from time to time by a notice of renewal being given before the expiration of five years from the original notice or any renewed notice. If whilst any such notice continues in force, application is made to deal with the stock or dividends in question, if the person on whose behalf the notice was given does nothing further for the period of eight days from such request, the company cannot refuse to permit the dealing with the stock or dividends as requested, but within this period such person may obtain a restraining order or commence an action, and in it obtain an injunction against dealing with the stock or dividends in question. Any notice given as aforesaid may be withdrawn by the person who gave it on a written request signed by him, or its operation may be made to cease by an order to be obtained by motion on notice, or by petition duly served by any other person claiming to be interested in the stock sought to be affected by the notice (1).

Restraining
order.

A restraining order is closely allied to a distringas.

(1) Rules 21-30 of April, 1880. As to the former writ of distringas, see Daniel's Ch. Pr. pp. 1540-1543.

It is an order obtained *ex parte* on motion or petition in a summary way, without any regular action being commenced, on evidence that the applicant is interested in a certain fund in the Bank of England or other public company, and that it is about to be wrongfully dealt with. It has the same effect as an injunction, but is only intended for interim purposes, and an action should afterwards be commenced, and an injunction obtained therein in the ordinary way. There does not therefore seem to be much, if any, object to be gained by applying for a restraining order, but where something more than a *distringas* is required it is better to at once commence an action, and apply therein for an injunction (*m*).

(*m*) 5 & 6 Vict. c. 5, s. 4. Daniel's Ch. Pr. pp. 1537-1540.

PART IV.

OF APPEAL.

CHAPTER I.

APPEALS TO HER MAJESTY'S COURT OF APPEAL (a).

ALL appeals to Her Majesty's Court of Appeal from interlocutory orders must be brought within twenty-one ^{Time for appealing.} days, and appeals from other orders within one year, unless special leave is given to bring the appeal after these times (b). The time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the Companies Acts, 1862 and 1867 (c), or any order or decision made in the matter of any bankruptcy; or in any matter not being an action (d), is the same as the time limited for appeal from an interlocutory order (e). Where an *ex parte* application to the Court below has been made and refused, an application to the Court of Appeal for a similar purpose must be made within four days from the date of such refusal (f). Leave to bring an appeal after these times will only be granted on shewing some special circumstances (g). The period within which

(a) As to the constitution, &c. of the Court, see ante, p. 18.

(b) Order LVIII. r. 15. An order overruling a demurrer is not an interlocutory order within this rule, and it may therefore be appealed from within a year. (*Trowell v. Shenton*, 8 Ch. Div. 318.)

(c) See *Re National Funds Assurance Co.*, 4 Ch. D. p. 305.

(d) As to such matters, see ante, Part III. Ch. V. See also *Re Baillie's trusts*, 4 Ch. D. p. 785.

(e) Order LVIII. r. 9.

(f) *Ibid.* r. 10.

(g) Griffith and Loveland's Pr. p. 466.

to appeal is calculated from the time at which the judgment or order is signed, entered, or otherwise perfected; or, in the case of the refusal of an application from the date of such refusal (*h*).

Mode of
appealing.

Appeals take place by way of re-hearing, and are brought by notice of motion in a summary way, and no petition, case, or other formal proceeding, except such notice of motion, is necessary. The notice of motion specifies whether the whole or part only of the judgment or order in question is appealed from, and in the latter case specifies such part (*i*). This notice of appeal—which is a fourteen days' notice if the appeal is from a judgment, and a four days' notice if from an interlocutory order (*k*)—must be served upon all parties directly affected by the appeal, and it is not necessary to serve parties not so affected; but the Court of Appeal has power to direct notice of the appeal to be served on all or any of the parties to the action or other proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal. Any notice of appeal may be amended by leave (*l*). The party appealing is called the appellants, and the party against whom the appeal is directed, the respondent.

Length of
appeal notice.

Setting down.

The notice of appeal having been given, the appeal must be set down for hearing within the time named in the notice of appeal, or if the Court is not then sitting, on the next day on which it does sit, otherwise the respondent is entitled to treat the motion as abandoned (*m*). The appeal is set down by producing to the proper officer of the Court of Appeal the judgment or order appealed from, or an office copy thereof, and leaving with him a notice of the appeal to be filed; the officer

(*h*) Order LVIII. r. 15.

(*i*) Ibid. r. 2.

(*k*) Ibid. r. 4.

(*l*) Ibid. r. 3.

(*m*) Haynes' Ch. Pr. p. 209.

then sets down the appeal in the list, and it comes on in its proper order to be heard (*n*). Under ordinary Security. circumstances, no deposit has to be made, or security given, on appealing; but a deposit or other security for the costs to be occasioned by any appeal may, under special circumstances, be directed by the Court of Appeal (*o*). Any application asking for a deposit or other security from the appellant, should be made immediately on receiving the notice of appeal; and as to what will constitute "special circumstances" for the Court to make such an order, the fact of the appellant being out of the jurisdiction of the Court, or in some cases in an insolvent state, or in a state of poverty, may be sufficient. However, of course, what will or will not in particular cases amount to "special circumstances" is a matter in the discretion of the Court (*p*).

It sometimes happens that in some points the respondent to an appeal is also dissatisfied with the judgment or order in some particular. In such a case it is not necessary for him to give notice of motion by way of cross appeal, but if he intends, upon the hearing of the appeal, to contend that the decision of the Court below should on any point be varied he must, if the appeal is from a final judgment, give an eight days' notice, and if from an interlocutory order, a two days' notice of such his intention to any parties who may be affected by such contention, and the whole matter can be then dealt with at the hearing (*q*). No notice of motion by way of cross appeal necessary.

An appeal is sometimes only on a point of law, but sometimes it is on a matter of fact. When any question of fact is involved in an appeal it is, unless Evidence on appeal.

(*n*) Order LVIII. r. 8.

(*o*) Ibid. r. 15.

(*p*) See various instances of applications for security on appeals, Griffith and Loveland's Pr. pp. 466-468.

(*q*) Order LVIII. rr. 6, 7.

some special order otherwise is made, brought before the Court of Appeal thus: (1.) As to any evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed and office copies of such of them as have not been printed. Any evidence by affidavit not printed in the Court below may be ordered to be printed for the use of the Court of Appeal, and should not be printed without such order. (2.) As to any evidence given orally, by the production of a copy of the Judge's notes or such other materials as the Court may deem expedient (*r*).

New evidence
on appeal.

The Court of Appeal is not necessarily restricted to the evidence used in the Court below, but has full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination of witnesses in Court, by affidavit, or by depositions taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from judgments after trial of any cause or matter upon the merits, further evidence (except as to matters subsequent as just mentioned) is only admitted by special leave of the Court, which is only granted on shewing some special grounds (*s*). Where a party on an appeal intends to apply for special leave to adduce further evidence, he need not give any formal notice of motion, but may give (without leave) notice to the other side of his intention to apply at the hearing for leave to give the evidence (*t*).

Amendment.

The Court of Appeal has all powers as to amendment or otherwise in the same way as the Court below (*u*).

(*r*) Order LVIII. rr. 11, 12.

(*s*) Ibid. r. 5.

(*t*) *Hastie v. Hastie*, 1 Ch. D. p. 562.

(*u*) Order LVIII. r. 5.

The appeal comes on in due course to be heard. ^{Hearing of} Where the subject-matter of it is a final order, decree, ^{appeal.} or judgment, the hearing must be before not less than three Judges of the Court sitting together, but when the subject-matter of the appeal is an interlocutory order, decree, or judgment, the hearing may be before two Judges of the Court sitting together, and if any doubt arises as to what judgments, decrees, or orders are final and what are interlocutory, the point is determined by the Court of Appeal (*x*). No Judge of the Court of Appeal may sit as a Judge on the hearing of any appeal from any judgment or order made by himself or by any Divisional Court of the High Court of which he was and is a member (*y*). However, a Judge has been held to be competent to take part in an appeal from a Divisional Court of which he is a member on a case in which he was not one of the sitting Judges when it was heard in the Division (*z*). On the argument of the appeal two counsel on each side are allowed to be heard (*a*). The Court finally gives its decision, either dismissing the appeal, or discharging or varying the judgment or order complained of, and it has full power to make such order as to the ^{Costs on} whole or any part of the costs of the appeal as may ^{appeal.} seem just (*b*).

In any cause or matter pending before the Court of ^{Incidental} Appeal any direction incidental thereto, not involving ^{directions on} the decision of the appeal itself, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court may at any time during vacation make any such interim order as he may think fit to prevent prejudice to the claims of any parties pending

(*x*) Jud. Act, 1875, s. 12.

(*y*) Jud. Act, 1875, s. 4.

(*z*) Griffith and Loveland's Pr. pp. 73, 74.

(*a*) Ibid. p. 456.

(*b*) Order LVIII. r. 5.

an appeal; but every such order made by a single Judge may be discharged or varied by the Court (*e*).

Staying
execution.

An appeal does not of itself stay execution or other proceedings under the decision appealed from; for it to have this effect application must be made to the Court appealed from or any Judge thereof, or to the Court of Appeal. Any application for a stay of execution or other proceedings should be made in the first instance to the Court below (*d*), and any such application cannot be made *ex parte*, but only on notice to the other side, and, as a general rule, if the order is made the applicant will be put under terms (*e*).

Application to
Court below
before Court
of Appeal.

Wherever an application may be made to the Court below or to the Court of Appeal, or to a Judge of the Court below or of the Court of Appeal, it must be made in the first instance to the Court or Judge below (*f*). Every application to a Judge of the Court of Appeal is made by motion, and the ordinary rules as to motions (*g*) apply to any such application (*h*).

Appeal from
decision of
Judge in
Chambers.

Where a question has been argued before the Judge himself in Chambers an appeal may be made direct to the Court of Appeal without leave. Where, however, it is intended to go direct to the Court of Appeal, application should be made to the Judge for a certificate that he does not require to hear further argument or to adjourn the summons into Court for argument (*i*). If, however, he refuses, the Court of Appeal will allow the case to be set down without (*k*).

(*e*) Jud. Act, 1873, s. 52.

(*d*) Order LVIII. rr. 16, 17.

(*e*) Griffith and Loveland's Pr. p. 469.

(*f*) Order LVIII. r. 17.

(*g*) See ante, pp. 141, 142, and see Order LVIII.

(*h*) Order LVIII. r. 18.

(*i*) Otherwise to go direct from Chambers to the Court of Appeal leave would have to be obtained; see Jud. Act, 1873, s. 50.

(*k*) Haynes' Ch. Pr. p. 202.

Orders made by consent, or as to costs only (*l*), which are by law left to the discretion of the Court, are not subject to appeal, except by special leave of the Court or Judge making such order (*m*). And where any Act of Parliament provides that any decision shall be final no appeal lies (*n*). Orders not subject to appeal.

The old processes of appeal by bills of exception and proceedings in error are abolished, and do not require any notice here. Bills of exception and proceedings in error.

Under the old practice the enrolment of a decree or order in Chancery prevented any appeal except to the House of Lords. There is, however, now no object gained by the enrolment, for the powers of the Court of Appeal are specially vested in it by the Judicature Act, 1873 (*o*). Enrolment.

(*l*) For some cases decided on the point of what is meant by "costs only," see Haynes' Ch. Pr. p. 203.

(*m*) Jud. Act, 1873, s. 49. See hereon Griffith and Loveland's Pr. pp. 70, 71.

(*n*) 39 & 40 Vict. c. 59, s. 20.

(*o*) 36 & 37 Vict. c. 66, s. 19.

CHAPTER II.

APPEALS TO THE HOUSE OF LORDS (*p*).

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ls.

EVERY appeal to the House of Lords is brought by way of petition, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty in her Court of Parliament (*q*). A form of petition is given by the Orders of November, 1876, under the Appellate Jurisdiction Act (39 & 40 Vict. c. 59), and it must be signed by two counsel, who have either attended as counsel in the Court below, or purpose attending as counsel at the hearing in the House of Lords, and they must certify that in their opinion it is a proper case to be heard before the House (*r*). The time limited for presenting petitions to the House is within one year from the date of the judgment or order appealed from (*s*).

entation of
al, &c.

The appeal is printed on parchment, and duly lodged in the Parliament office for presentation to the House, and an order is issued thereon for service on the respondents or their solicitors, ordering them to lodge cases in answer to the appeal, which order must be returned to the Parliament office, together with an affidavit of service, within six weeks' time, or, in the case of Irish and Scotch appeals, within eight-weeks' time (*t*).

(*p*) As to origin and present constitution of the House of Lords, see ante, pp. 25, 26.

(*q*) 39 & 40 Vict. c. 59, s. 4.

(*r*) Standing Order 2.

(*s*) Ibid. 1.

(*t*) Standing Order 3, and Orders of November, 1876, under Appellate Jurisdiction Act.

Within one week after the presentation of the appeal, security must be given for the costs of it. The security consists of the appellant's own recognizance, and the payment in by him to the account of the Fee Fund of the House of Lords of the sum of £200, or, instead of that payment, the giving of a bond with two sufficient sureties to the amount of £200. In the event of this latter mode of security being adopted, two clear days' previous notice of the names proposed must be given to the solicitor or agent of the respondent. The recognizance and bond must be returned into the Parliament office, duly executed, within one week from the date of their having issued to the solicitor or agent of the appellant. On default by the appellant in complying with the above requirements, the appeal stands dismissed (*u*).

The appeal having been lodged, the order served, and the security given, the next step is the lodging by the parties of their cases in the Parliament office. These cases contain the different parties' statements, and must be printed; in English appeals they must be lodged within six weeks from the date of the presentation of the appeal, and in Scotch and Irish cases within eight weeks. The cases must be signed by one or more counsel, who have attended as counsel in the Court below, or who purpose attending as counsel at the hearing in the House (*x*). If the parties are able to agree on their statement of the subject-matter, a joint case may be lodged, with reasons *pro* and *con*. In addition to the printed cases or case, a printed appendix or printed appendices, also have to be lodged, consisting of such documents or parts thereof used in evidence in the Court below, as may be necessary for reference on the argument of the appeal (*y*).

(*u*) Standing Order 4.

(*x*) Ibid. 5.

(*y*) Orders of November, 1876, under Appellate Jurisdiction Act.

Cross appeals. If any respondent is dissatisfied with the judgment or order complained of by the appellant, he must, within the time above noticed for lodging his case, present a cross appeal (z).

Setting down of appeal. The appeal is set down for hearing on the first sitting day after the expiration of the time allowed for the respondent to lodge his case, or as soon before, at the option of either party, as all respondents' cases have been lodged. On default by the appellant, the appeal stands dismissed (a).

Hearing and disposal of appeal. The appeal in due course comes on to be argued, and is disposed of by the decision of the House, which may make an order as to payment of costs, and provision is made for the taxation of such costs (b).

(z) Standing Order 6. Orders of November, 1876, under Appellate Jurisdiction Act.

(a) Standing Order 5.

(b) See hereon Haynes' Ch. Pr. 215-224.

CHAPTER III.

APPEALS FROM INFERIOR COURTS.

APPEALS from inferior Courts, which might, under the old practice, have been brought to any Court or Judge whose jurisdiction is now transferred to the High Court of Justice, may be heard by Divisional Courts of the High Court, and the determination of such appeals by such Divisional Courts is final, unless special leave to appeal from the same to the Court of Appeal is given by the Divisional Court by which any such appeal from an inferior Court has been heard (*c*). Every Judge of the High Court for the time being is a Judge for the purpose of hearing and determining these appeals as just mentioned. All such appeals (except Admiralty Appeals, which are assigned to the Admiralty Division) are entered in one list by the proper officer at the Central office of the Supreme Court (*d*), and are heard by such Divisional Court composed of the Judges of the Queen's Bench Division, as the president of that Division from time to time directs (*e*). Appeals to be to Divisional Courts.

The most usual appeals from inferior Courts occur— County Court appeal.
ring in practice are appeals from County Courts. These appeals may be either in the form of a case (*f*) or by motion (*g*).

(*c*) Jud. Act, 1873, s. 45. It may be noticed that it has been decided that an appeal from the Lord Mayor's Court lies to the Divisional Court only, and that there is no appeal to the Court of Appeal without special leave. *Appleyard v. Judkins*, 3 C. P. D. 489.

(*d*) Formerly by the officers of the Crown office, but see now 42 & 43 Vict. c. 78, ss. 4-7.

(*e*) Order LVIII. r. 19.

(*f*) 13 & 14 Vict. c. 61, s. 14.

(*g*) 38 & 39 Vict. c. 50, s. 6. As to the cases in which a party has a right of appeal, see Pollock and Nicol's County Court Practice, pp. 235-238.

Appeal in the
form of a case.

A party appealing by means of a case must within ten days after the County Court decision give notice of appeal in writing to the other party or his solicitor, stating therein the ground on which he appeals. The notice must be signed by the appellant, his solicitor, or agent, and must be served on the Registrar of the County Court, as well as on the successful party. The notice of appeal does not operate as a stay of proceedings unless otherwise ordered. Within the same period of ten days, the party appealing must give security to the Registrar of the Court for the costs of the appeal, and if he be defendant, for the amount of the judgment, in case the appeal should be dismissed. The security may be either a bond executed by the appellant and two sureties, or a deposit of money; and if the appellant fails to give security, the Court will not hear the appeal. The case is then drawn up by the appellant or his solicitor, and submitted to the other party, and if possible the same is agreed on between them; but if they cannot agree on it, it is settled by the County Court Judge. It is finally signed by him and sealed with the seal of the Court, and within three days thereafter one copy is deposited with the Registrar of the County Court, and one copy sent to the successful party or his solicitor (*h*). It is also duly entered by the appellant at the Central office of the Supreme Court (*i*) for hearing, within the same period of three days, and notice thereof given to the other party, and the appellant must also, four clear days before the day appointed for argument, deliver two copies of the case, at the proper office, for the use of the Judges of the Divisional Court to which such cause has been assigned for argument (*k*). The cause then comes on in due course, and is disposed of by the Divisional Court.

(*h*) Pollock and Nicol's County Court Practice, pp. 240-242.

(*i*) Formerly at the Crown office, but see now 42 & 43 Vict. c. 78, ss. 4-7.

(*k*) Additional Order of 22nd January, 1877. See Griffith and Loveland's Pr. p. 472.

A motion is a new mode of appealing from a County Court. Any person aggrieved by the ruling, order, direction or decision of a County Court Judge and having a right of appeal may, at any time within eight days after the same shall have been made or given, appeal against it to the Divisional Court by motion instead of by special case, such motion being *ex parte* in the first instance, and granted on such terms as to costs, security, or stay of proceedings as to the Court to which the motion is made seems fit. If the Divisional Court is not then sitting the motion may be made to any Judge of the High Court sitting in Chambers (l).

The course of practice under this provision is, in the first instance, to obtain from the County Court Judge a copy of his notes made at the hearing before him, and also of the objection on the point of law made before him at the hearing, and this such Judge is bound to furnish on being applied to for it, at the expense of the party requiring it (m). This being obtained counsel is instructed to move the Divisional Court *ex parte*, or if the Court is not then sitting to apply in Chambers to a Judge *ex parte*, and on this application the copy of the Judge's notes signed by the Judge must be handed in to the Judge or the proper officer to receive them (n). The application is then either refused or a rule or order *nisi* (o) is granted, which is drawn up and duly served on the solicitor for the other party and on the Registrar of the County Court appealed from. The rule or order and the Judge's notes are then taken to the Central office of the Supreme Court (p) and filed there, and the appeal entered for argument. Notice is given to the solicitor of the other party of the day for

(l) 38 & 39 Vict. c. 50, s. 6.

(m) Ibid.

(n) See additional order of 22nd January, 1877, Griffith and Loveland's Pr. p. 472.

(o) As to a rule *nisi*, see ante, p. 68.

(p) Formerly to the Crown office, but see now 42 & 43 Vict. c. 78, ss. 4-7.

which it has been entered, and in due course it comes on to be heard and is disposed of.

When no
appeal from
County Court.

No appeal lies from the decision of a County Court if before such decision is pronounced both parties agree in writing, signed by themselves or their solicitors or agents, that the decision of the Judge shall be final. Such an agreement requires no stamp (*q*).

(*q*) 19 & 20 Vict. c. 108, s. 69.

APPENDIX.

I.

A TABLE OF SOME OF THE PRINCIPAL TIMES OF PROCEEDINGS.

ACCOUNT UNDER ORDER XV.. . .	Application may be made in default of appearance, or at any time after appearance, writ being indorsed with claim for an account.
AFFIDAVITS	When evidence by consent to be by affidavits, plaintiff's affidavits must be filed within 14 days after consent; defendant's affidavits within 14 days of delivery of list of plaintiff's affidavits; and plaintiff's affidavits in reply within 7 days of expiration of the time for defendant's affidavits. Notice for cross-examination on, must be served within 14 days after time for filing affidavits in reply.
AMENDMENT	Writ of summons may be amended at any time by leave. (As to when pleadings may be amended without leave, see <i>ante</i> , pp. 65, 66.) When an order is obtained for leave to amend, amendments must be made within 14 days.
ANSWER TO INTERROGATORIES: See DISCOVERY.	
APPEAL	From a Master to a Judge within 4 days. From a Judge in Chambers to a Divisional Court within 8 days. To Court of Appeal from interlocutory orders, winding-up orders, or in bankruptcy, within 21 days. To Court of Appeal from an <i>ex parte</i> application within 4 days. To Court of Appeal in other cases within 1 year. Notice of, 14 days if appeal from a judgment, but if from an interlocutory order 4 days. Must be set down within time named in notice of appeal. Notice of, by a respondent in an existing appeal 8 days, if appeal from a judgment, but if from an interlocutory order 2 days.

APPEAL—continued.

- To House of Lords within 1 year, but in case of disability, within 1 year of disability ceasing, and in case of absence within 5 years at utmost.
- From County Court : When by special case, notice of appeal and security for appeal within 10 days, and case to be transmitted to Court of Appeal within 3 clear days after signature. When by motion, same to be made within 8 days.
- APPEARANCE** To writ of summons, if defendant within jurisdiction, within 8 days after service—if not within it, then within time fixed by order.
- Defendant may appear though time expired provided judgment not signed.
- Notice of and service of duplicate sealed memorandum must be effected on day of appearance, or sent by post that day.
- When a notice given to a third party (see *ante*, pp. 31, 32), if he wishes to dispute claim, he must appear within 8 days.
- ARBITRATION** On compulsory reference under Common Law Practice Act, 1854, arbitrator must make award within 3 months of application and entering on reference.
- Application to set aside award made on a compulsory reference must be made within the first 7 days of the term next following the publication.
- Where at trial *action only* referred, time for moving to set aside award same as motion for a new trial.
- Where at trial *all matters in difference* are referred, or where reference by rule or order not at the trial, motion to set aside award must be made before the last day of what, before the Judicature Acts, was the next term after the publication of the same.
- BILL OF SALE** With affidavit must be filed in Master's office within 7 days after execution.
- CERTIFICATE OF CHIEF CLERK** Time for taking opinion of Judge on, 4 clear days from signature by Chief Clerk.
- Application to vary within 8 clear days from being signed by Judge.
- CLAIM, STATEMENT OF** Must be delivered within 6 weeks from appearance.
- CONCURRENT WRITS** May be issued at any time whilst original writ remains in force.
- CROSS-EXAMINATION** Notice for, must be served within 14 days after time for filing affidavits in reply.
- COUNTERCLAIM** To be put in with statement of defence.
- COUNTY COURT** Appeal from : See **APPEAL**.
- DEFENCE, STATEMENT OF** Must be delivered within 8 days from delivery of statement of claim. But if no statement of claim required then within 8 days after appearance.

DEFENCE, STATEMENT OF—*continued.*

When leave to defend given under Order xiv. (see *ante*, pp. 52, 53) then within time ordered, or if no time ordered within 8 days after order.

Where further defence or reply arises during action, and after defence put in, leave to set it up must be obtained within 8 days of its so arising.

DEMURRER Within the same time as other pleadings in action.

DISCONTINUANCE . . Any time before taking any step in action after defence other than an interlocutory application, after that only by leave.

DISCOVERY Interrogatories may be delivered by plaintiff with statement of claim, or by defendant with statement of defence, or by either of them at any subsequent period before the close of the pleadings. After that only by leave.

Application to strike out any interrogatories must be made within 4 days of their delivery.

Affidavits answering interrogatories to be filed within 10 days.

When notice given to produce certain documents for inspection in the course of the action, the party receiving such notice must within 2 days, if all documents referred to therein have been set out in his affidavit of documents, or if not, then within 4 days, give notice to the opposite party stating a time within 3 days from delivery of such notice at which the documents can be inspected by him.

DISMISSAL FOR WANT
OF PROSECUTION

If statement of claim not delivered within the 6 weeks allowed.

If notice of trial not given within the 6 weeks allowed from the close of the pleadings.

If default made in obeying an order for discovery or inspection.

DISTRINGAS PROCESS . Affidavit and notice only have effect for 8 days from application to deal with fund, and only have force for 5 years unless renewed.

EJECTMENT In an action for recovery of land, defence may be limited to a part, by serving notice to that effect within 4 days after appearance.

ENTRY OF CAUSE FOR TRIAL: *See* TRIAL.

EXECUTION May generally issue immediately after final judgment. Writ of, in force for 1 year, but may be renewed for further period of 1 year, and so on from time to time.

After 6 years from date of judgment, or after change of parties, leave must be given to issue.

Also leave must be obtained to issue it on judgment *quando acciderint*.

GUARDIAN Notice of application for a guardian *ad litem* to be appointed to a defendant who has not appeared, must be served 6 clear days before day of hearing.

INSPECTION: <i>See</i> DISCOVERY	Under notice to inspect and admit defendant must admit within 48 hours.
INTERPLEADER	At any time after service of writ of summons and before defence.
INTERROGATORIES: <i>See</i> DISCOVERY .	
JOINDER OF ISSUE	If not delivered with reply, within 4 days after delivery of previous pleading.
JUDGMENT	<p>Final judgment by default may be issued at expiration of time limited for appearance, if writ specially indorsed; but if writ for unliquidated damages, then only interlocutory judgment.</p> <p>Final judgment may be signed in default of statement of defence if claim for a fixed liquidated amount, but if for unliquidated damages, then only interlocutory judgment.</p> <p>Where at trial, judgment not directed to be entered plaintiff must set cause down on motion for judgment within 10 days after trial, otherwise defendant may do so.</p> <p>No action can be set down on motion for judgment after 1 year.</p>
JURY	<p>Special, notice for to defendant, same as notice of trial.</p> <p>Special, notice for to plaintiff 6 days.</p>
LIMITATION OF ACTIONS.	<p>Actions must be brought within the following periods respectively:—</p> <p>Adwosons, to recover, 3 adverse incumbencies, or 60 years, or at the utmost within 100 years.</p> <p>Assault, 4 years.</p> <p>Assumpsit, 6 years.</p> <p>Covenant, 20 years.</p> <p>Debt, speciality, 20 years,</p> <p>Debt, simple contract, 6 years.</p> <p>False imprisonment, 4 years.</p> <p>Intestacies, share under, 20 years.</p> <p>Justices, actions against, 6 calendar months.</p> <p>Land, recovery of, 12 years: but if disability, 6 years from ceasing, the extreme period being 30 years.</p> <p>Legacy, 12 years.</p> <p>Libel, 6 years.</p> <p>Slander, 2 years.</p> <p>Trespass to person or goods, 4 years.</p> <p>Under Lord Campbell's Act (9 & 10 Vict. c. 93), within 1 year of death; if not brought within first 6 months by executor or administrator, person beneficially interested may bring action within remaining 6 months.</p> <p>Under Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), notice must be given within 6 weeks of injury, and action brought within 6 months of injury, or if death ensue, within 12 months of death.</p>

MODE OF TRIAL: *See* TRIAL.

MOTION, NOTICE OF . . . 2 clear days required.

MOTION FOR JUDGMENT: *See* JUDGMENT.

NEW TRIAL: *See* TRIAL.

NOTICE Of action, when required, 1 calendar month.
After no proceeding in an action for a year 1 month's notice necessary.
Of trial, 10 days, long; 4 days, short.
For special jury, to defendant, same as notice of trial.
" " to plaintiff, 6 days.
Of motion, 2 days.
Of taxing costs in Common Law, 1 day.

PAYMENT INTO COURT May be made by defendant immediately on being served with writ, or up to delivering his defence; afterwards only by leave.
Plaintiff may, within 4 days after notice of payment in, or if payment is stated in defence, then before reply, accept payment in satisfaction. If he does this, he gives notice thereof, and taxes his costs; and if not paid within 48 hours he may sign judgment for them.

PETITION 2 clear days between service and hearing.

REPLEVIN In superior Court, bond conditioned to commence action within 1 week.
In County Court within 1 month.

REPLY Must be delivered within 3 weeks from defence.
Further reply arising pending action, within 8 days after its arising.

REJOINDER Within 4 days of previous pleading, and only allowed without leave if it simply contains joinder of issue.

SERVICES OF PLEADINGS, &c. Before 6 p.m., and on Saturdays before 2 p.m.

SERVICE OF WRIT . . . Memorandum of, must be indorsed within 3 days after service.

STATEMENT: *See* CLAIM: DEFENCE; REPLY.

SUMMONS: *See* WRIT OF

SUMMONS In Chancery Division, if originating proceedings, to be served 7 clear days before return. If otherwise 2 clear days before return.
If in Queen's Bench Division, service sufficient if made day before return day.

TIME, COMPUTING . . . Where time allowed is not clear days, these do not include the first day, but include the last.
Sunday, Christmas Day, and Good Friday not reckoned in periods of less than 6 days.

TRIAL Notice of, 10 days, but if under terms to take short notice, then 4 days.

194 A TABLE OF SOME OF THE PRINCIPAL TIMES OF PROCEEDINGS.

TRIAL—continued.

Notice of, to be given with reply, or at any time after close of pleadings, but if plaintiff do not give notice of trial within 6 weeks from close of pleadings, defendant may do so, or apply to dismiss action.

Plaintiff in notice states mode of trial, but if other than by jury defendant may within 4 days of service of the notice of trial give a notice that he requires a jury.

In London or Middlesex plaintiff may enter cause for trial same day as notice of trial given, or next day, defendant within 4 subsequent days, and if not entered by either party within 6 days notice of trial falls through.

At the Assizes either party may enter cause for trial, but if entered by both it is tried in the order of the plaintiff's entry.

New trial should be applied for if case has been heard in London or Middlesex within 4 days of trial or on first subsequent day of sittings; if trial elsewhere than in London or Middlesex, then within first 7 days of last day of sittings of the circuit, or within first 4 days of the following sittings, if such day occurs during or within a week immediately before vacation.

VACATIONS Long Vacation from 10th August to 24th October.

WRIT OF EXECUTION: See EXECUTION.

WRIT OF SUMMONS . Remains in force for 12 months, but may be renewed for 6 months, and so on from time to time, on shewing reasonable efforts have been made to effect service, or for other good reason.

Concurrent, may be issued at any time during currency of original writ.

Service of, to be indorsed within 3 days thereafter.

II.

FORMS.

(1.) WRIT OF SUMMONS (*ante*, pp. 37, 122).

IN THE HIGH COURT OF JUSTICE.
— Division.

1881 S. No ..

Between JOHN SMITH . . . Plaintiff
and
ALFRED BROWN . . . Defendant.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to Alfred Brown, of in the of

WE COMMAND YOU, that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of John Smith.

And take notice that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

Witness, ROUNDELL BARON SELBORNE, Lord High Chancellor of Great Britain, at Westminster, the day of , in the year of Our Lord One thousand eight hundred and eighty-one.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of such renewal, including the day of such date, and not afterwards.

The defendant — may appear thereto by entering an appearance, either personally or by solicitor, at the Central Office, Royal Courts of Justice, Strand, in the County of Middlesex.

INDORSEMENT THEREON.

The plaintiff's claim is [*here state it*]

And £ s. d. for costs; and if the amount claimed be paid to the plaintiff or his solicitor within four days from the service hereof, further proceedings will be stayed (a).

This writ was issued by A. B., of &c., solicitor for the said plaintiff, who resides at

The address for service is [*Solicitor's address*].

This writ was served by of on the defendant on day, the day of 1881.

Indorsed the day of 1881.

(a) If for unliquidated damages or in cases in the Chancery Division these words will be omitted.

(2.) STATEMENT OF CLAIM (*ante*, p. 57).

IN THE HIGH COURT OF JUSTICE. 1881 S. No. .
 — Division.

Writ issued 1881.
 Between JOHN SMITH . . . Plaintiff
 and
 ALFRED BROWN . . Defendant.

STATEMENT OF CLAIM DELIVERED ON THE DAY OF 1881 BY
 MR. A. B. OF &C., PLAINTIFF'S SOLICITOR.

1. The plaintiff is a general house furnisher carrying on business in Oxford Street in the county of Middlesex. The defendant is a gentleman residing at Kensington.

2. In the month of June 1880 the plaintiff at the request of the defendant supplied to him certain furniture to the value of £150.

3. The plaintiff has furnished to the defendant accounts and invoices of the furniture so supplied and has at various times applied to the defendant for payment of such sum of £150 but the defendant has not paid the same or any part thereof.

The plaintiff claims £150.

The plaintiff proposes that this action should be tried in the City of London (b).

(3.) STATEMENT OF DEFENCE (*ante*, pp. 57, 58).

IN THE HIGH COURT OF JUSTICE. 1881 S. No. .
 — Division.

Between JOHN SMITH . . . Plaintiff
 and
 ALFRED BROWN . . Defendant.

STATEMENT OF DEFENCE DELIVERED THE DAY OF 1881 BY
 MR. C. D. OF &C., DEFENDANT'S SOLICITOR.

1. The defendant admits that in the month of June 1880 he requested the plaintiff to supply him with certain furniture. The plaintiff however never supplied him with the furniture required but did send and leave at the defendant's residence certain other furniture of an inferior quality and in other respects of a different description from that ordered.

2. The defendant has never accepted the said furniture so sent but has always refused to accept the same and has required the plaintiff to take the same back and has offered to return it to the plaintiff but the plaintiff has refused to receive it back.

(b) Or elsewhere, according to circumstances. If no place is stated the place of trial will be Middlesex (see hereon, *ante*, p. 78).

(4.) REPLY (*ante*, pp. 60, 61).

IN THE HIGH COURT OF JUSTICE. 1881 S. No. .
 — Division.

Between JOHN SMITH . . . Plaintiff
 and
 ALFRED BROWN . . . Defendant.

REPLY DELIVERED THE DAY OF 1881 BY A. B. OF &C.,
 PLAINTIFF'S SOLICITOR.

The plaintiff joins issue on the defendant's statement of defence (c).

(5.) NOTICE OF TRIAL (*ante*, p. 88).

IN THE HIGH COURT OF JUSTICE. 1881 S. No. .
 — Division.

JOHN SMITH v. ALFRED BROWN.

TAKE NOTICE of trial of this action [*or of the issues in this action ordered to be tried*] by a judge and jury [*or as the case may be*] in London [*or as the case may be*] for the day of next.

Dated 1881. A. B., PLAINTIFF'S SOLICITOR,
 To C. D., DEFENDANT'S SOLICITOR [*or agent*].

(6.) DEMURRER (*ante*, p. 62).

IN THE HIGH COURT OF JUSTICE. 1881 S. No. .
 — Division.

JOHN SMITH v. ALFRED BROWN.

The defendant [*or plaintiff, as the case may be*] demurs to the [*plaintiff's statement of complaint or defendant's statement of defence, or set-off or of counterclaim as the case may be, or to so much of the plaintiff's statement of complaint as claims . . . or as alleges as a breach of contract the matters mentioned in paragraph or as the case may be*] and says that the same is bad in law on the ground that [*here state a ground of demurrer*] and on other grounds sufficient in law to sustain this demurrer.

(c) For various forms of proceedings throughout an action, see Griffith and Loveland's Pr. pp. 479-553.

(7.) AFFIDAVIT AS TO DOCUMENTS (*ante*, p. 75).

IN THE HIGH COURT OF JUSTICE.
— Division.

1881 S. No. .

Between JOHN SMITH . . . Plaintiff
and
ALFRED BROWN . . . Defendant.

I, the above-named defendant Alfred Brown make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had but have not now in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents, and in whose possession they now are*].

7. According to the best of my knowledge information and belief I have not now and never had in my possession custody or power or in the possession custody or power of my solicitors or agents solicitor or agent or in the possession custody or power of any other persons or person on my behalf any deed account book of account voucher receipt letter memorandum paper or writing or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in this suit or any of them or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said first and second schedules hereto.

(8.) NOTICE TO PRODUCE DOCUMENTS FOR INSPECTION
(*ante*, pp. 75, 76).

IN THE HIGH COURT OF JUSTICE.
— Division.

1881 S. No. .

JOHN SMITH *v.* ALFRED BROWN.

TAKE NOTICE that the plaintiff [*or defendant, as the case may be*] requires you to produce for his inspection the following documents referred to in your [*statement of claim, or defence, or affidavit*] dated the day of
[*Describe documents required to be produced.*]

Dated the day of 1881. Yours, &c.

A. B., PLAINTIFF'S SOLICITOR.

To C. D., DEFENDANT'S SOLICITOR [*or agent*].

(9.) NOTICE TO INSPECT DOCUMENTS (*ante*, p. 76).

IN THE HIGH COURT OF JUSTICE.
— Division.

1881 S. No. .

JOHN SMITH *v.* ALFRED BROWN.

TAKE NOTICE that you can inspect the documents mentioned in your notice of the day of , at my office on Thursday next, the instant, between the hours of 12 and 4 o'clock.

[Or, that the [*defendant or plaintiff*] objects to giving you inspection of the documents mentioned in your notice of the day of , on the ground that [*state the ground*].]

Dated the day of 1881. Yours, &c.

C. D., DEFENDANT'S SOLICITOR.

To A. B., PLAINTIFF'S SOLICITOR [*or agent*].

(10.) NOTICE TO INSPECT AND ADMIT (*ante*, pp. 90, 91).

IN THE HIGH COURT OF JUSTICE.
 — Division.

1881 S. No. .

JOHN SMITH *v.* ALFRED BROWN.

TAKE NOTICE that the [*plaintiff or defendant*] in this action proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the [*defendant or plaintiff*] his solicitor or agent, at on day, the day of between the hours of and in the noon, and the [*plaintiff or defendant*] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered, were so served, sent or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this action.

Dated this day of 1881. (Signed)

Solicitor for the [*plaintiff or defendant*].To Solicitor for the [*defendant or plaintiff*].

ORIGINALS.

Description of Documents.	Date.

COPIES.

Description of Documents.	Date.	Original or duplicate served, sent or delivered, when, how, and by whom.

(11.) NOTICE TO PRODUCE (*ante*, p. 90).

IN THE HIGH COURT OF JUSTICE.
— Division.

1881 S. No. .

Between JOHN SMITH . . . Plaintiff
and
ALFRED BROWN . . Defendant.

TAKE NOTICE that you are hereby required to produce and shew to the Court on the trial of this action all books, papers, letters, copies of letters, and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this action, and particularly [*here enumerate any special documents*].

Dated the day of 1881.

(Signed) of ,

Solicitor for the above-named [*plaintiff or defendant*].

To the above-named [*defendant or plaintiff*],
and to Mr. his solicitor or agent.

(12.) COSTS ON JUDGMENT UNDER ORDER XIV. (*ante*, p. 53).

IN THE HIGH COURT OF JUSTICE.
— Division.

1881 S. No. .

Between JOHN SMITH . . . Plaintiff
and
ALFRED BROWN . . Defendant.

COSTS OF PLAINTIFF under Order dated day of 1881.

	1881	£	s.	d.
	Letter before action		3	6
	Instructions to sue		6	8
	Writ and attending to issue and paid		11	8
	Special indorsement		5	0
	Copy for service		1	0
	Service of writ		5	0
Agency Charges, if any.				
	Affidavit of service and oath		6	6
	Instructions for affidavit in support of sum- mons for leave to sign judgment		6	8
	Drawing same, folios 6		6	0
	Engrossing		2	0
	Attending deponent to be sworn		6	8
	Paid oath		1	6
	Copy affidavit for defendant's solicitor		2	0
	Paid filing		2	0

	1881	£	s.	d.
<i>Further Ad- jourments, if any.</i>	Summons for leave to sign judgment, copy to file and copy and service	9	6	
	Attending summons, same adjourned	3	4	
	Attending adjourned summons, Order made	6	8	
	Order, copy and service	6	6	
	Close copy Order	1	0	
	Drawing judgment	3	4	
	Attending to sign	6	8	
	Paid	10	6	
	Drawing costs and two copies, folios 5	5	0	
	Notice to tax and service	4	0	
	Attending taxing	6	8	
	Paid taxing			
	Term fee, &c. (15s. or if agency £1 1s.)			

The following notice will be indorsed on the copy of the costs delivered to defendant's solicitor.

To Mr. of

Defendant's Solicitor.

TAKE NOTICE, that I shall attend at the Master's Office, Royal Courts of Justice, Strand, London, on the day of 1881, at o'clock in the noon, to tax the within costs.

Dated this day of 1881.

Yours, &c., A. B.,
Plaintiff's Solicitor.

(13.) FORM OF AN ADMINISTRATION JUDGMENT, OR ORDER, CONTAINING THE MOST USUAL ACCOUNTS AND INQUIRIES IN AN ORDINARY ADMINISTRATION ACTION.

THIS COURT doth order that the following accounts and inquiry be taken and made; that is to say:

- (1.) An account of the personal estate not specifically bequeathed of deceased, the testator in the pleadings named come to the hands of .
- (2.) An account of the testator's debt.
- (3.) An account of the testator's funeral expenses.
- (4.) An account of the testator's legacies and annuities (if any) given by the testator's will.
- (5.) An inquiry what parts (if any) of the testator's said personal estate are outstanding or undisposed of.

And it is ordered that the testator's personal estate not specifically bequeathed, be applied in payment of his debt and funeral expenses in a due course of administration, and then in payment of the legacies and annuities (if any) given by his will.

If real estate—

And it is ordered that the following further inquiries and account be made and taken; that is to say:

(6.) An inquiry what real estate the testator was seised of or entitled to at the time of his death.

(7.) An account of the rents and profit of the testator's real estate received by, &c.

(8.) An inquiry what incumbrances (if any) affect the testator's real estate or any and what parts thereof.

If sale directed—

(9.) An account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.

(10.) An inquiry what are the priorities of such last-mentioned incumbrances.

And it is ordered that the testator's real estate be sold with the approbation of the judge, &c.

And it is ordered that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

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